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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

KATHLEEN WILDCATT v. JOHN LLOYD SMITH

No. 8330DC773

(Filed 19 June 1984)

Indians § 1 — judgment finding defendant in contempt for failure to pay child support — jurisdiction of state court as opposed to Court of Indian Offenses

A trial court erred in finding defendant in contempt and ordering him jailed until he paid \$6,500 in arrearages for child support in 1983 where a default judgment was entered against defendant on 15 July 1980, but on 28 July 1980 the Cherokee Court of Indian Offenses began operation. Any exercise of state power after the creation of the Indian court system unduly infringed upon the tribe's asserted right of self-government.

Judge JOHNSON concurring in the result.

APPEAL by defendant from *Snow, Judge*. Order entered 3 May 1983 in SWAIN County District Court. Heard in the Court of Appeals 2 May 1984.

Defendant appeals from a state court judgment holding him in contempt for failure to comply with a 1980 default judgment which required him to pay \$200.00 per month to plaintiff for the support of the couple's two illegitimate children. Defendant contends that both the default judgment and the contempt order are void for lack of subject matter and personal jurisdiction.

Plaintiff's attempts to obtain child support from defendant began in April 1980 when she filed an action in Swain County District Court, seeking a determination of paternity and an award of child support. Defendant failed to file a timely answer and a de-

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fault judgment was entered against him on 15 July 1980. On 28 July 1980 the Cherokee Court of Indian Offenses began operation and on 5 September 1980, plaintiff applied to the tribal court for enforcement of the state default judgment. The Court of Indian Offenses accorded full faith and credit to the state court judgment but that decision was reversed on 3 June 1981 by the Indian Appeals Court, which held that the state court lacked subject matter jurisdiction to enter the default judgment.

While the appeal was pending before the Indian Appeals Court, plaintiff filed a motion in Swain County District Court to hold defendant in contempt for failing to comply with the default judgment. Following a hearing on 3 February 1981, the trial court denied plaintiff's motion and also denied defendant's motion to set aside the 15 July 1980 default judgment for lack of personal and subject matter jurisdiction.

On 5 June 1981, two days after the decision of the Indian Appeals Court, plaintiff filed a new action against defendant in the Court of Indian Offenses, seeking an adjudication of paternity and an award of child support. Lengthy delays and attempts to settle the case followed, and when negotiations broke down, plaintiff filed another motion in Swain County District Court for enforcement of the initial default judgment. At a hearing on the motion on 3 May 1983, the trial court found defendant in contempt and ordered him jailed until he paid \$6,500.00 in arrearages for child support. On 12 May 1983 plaintiff obtained a voluntary dismissal of the suit pending before the Court of Indian Offenses. From entry of the trial court order finding him in contempt, defendant appealed.

Western North Carolina Legal Services, Inc., by Lawrence Nestler and James H. Holloway, for plaintiff.

Holt, Haire, Bridgers and Bryant, P.A., by Ben Oshel Bridgers, for defendant.

WELLS, Judge.

This appeal raises for the first time the question of subject matter jurisdiction of our state courts over civil actions between members of the Eastern Band of Cherokees living on the reserva-

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tion, following the recent creation of a tribal court system by the Eastern Band.¹

It is axiomatic that personal and subject matter jurisdiction are essential prerequisites to entry of a valid court order. It is also beyond dispute that a defendant may challenge a court's subject matter jurisdiction at any stage of the proceedings, but may not raise the issue of personal jurisdiction for the first time on appeal. In the case at bar, defendant failed to make timely challenges to the personal jurisdiction of the state court in the 1980 default action and the 1983 contempt hearing; thus defendant's argument that the trial court lacked personal jurisdiction is overruled. Defendant's contention that the state court lacked subject matter jurisdiction and was thus powerless to enter either the 1980 default judgment or the 1983 contempt order requires more detailed discussion.

The general subject of Indian law is well beyond the scope of this opinion and we confine ourselves to the issue of jurisdiction over civil suits arising on tribal lands. A few well-established principles of law bear repeating at the outset, beginning with the proposition that federal power to regulate Indian affairs is plenary and supreme.² The states generally have only such power over Indian affairs on a reservation as is granted by Congress,³ while

1. The Eastern Band had no court system of its own until the present decade, and members were forced to resort to state or federal courts to settle their disputes. By 1979, however, growing activism on the part of members of the Eastern Band, coupled with recognition by the state that it could no longer assert jurisdiction over felonies occurring on Indian reservations in the light of *United States v. John*, 437 U.S. 634 (1978), led to a request for federal permission to establish a tribal court system. Defendant's assertion that the North Carolina Attorney General issued a formal opinion withdrawing all state jurisdiction and law enforcement support from the reservation in response to *United States v. John*, *supra*, appears mistaken. Federal authorization for the tribal court system was granted in 1979, and the Cherokee Tribal Council responded on 10 July 1980, by enacting legislation creating the court system, and setting 28 July 1980 as the date for commencement of court operations.

2. *United States v. Mazurie*, 419 U.S. 544 (1975), S. Sherick, "State Jurisdiction Over Indians As A Subject of Federal Common Law: The Infringement-Preemption Test" 21 Ariz. L. Rev. 85 (1979), F. Cohen, *Handbook of Federal Indian Law*, 1982.

3. F. Cohen, *supra* n. 1, at 259, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

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the tribes retain powers inherent to a sovereign state, except as qualified and limited by Congress.⁴

To ask what entity possesses subject matter jurisdiction over a cause of action is to inquire about the way the power of governing has been allocated. The answer turns as much upon the history and political structures of our nation as upon legal theory in the area of Indian law, where tribes and the federal and state governments have all exercised varying degrees of sovereignty at different times. We turn therefore to an examination of the history of the relationship between the Eastern Band of the Cherokee and the state and federal governments for insight into the ways decision-making power has been distributed.

A detailed history of the Cherokees of North Carolina is set out in *The Cherokee Trust Funds*, 117 U.S. 288 (1886), *United States v. Wright*, 53 F. 2d 300 (4th Cir. 1931) and therefore we will not fully repeat those accounts here. It is sufficient to note that the Cherokee Indians were once one of several dominant Indian tribes occupying what is now North Carolina, South Carolina, Tennessee, Georgia and Alabama and that the tribes were sovereign entities with inherent powers to govern and settle disputes among their members, W. Canby, *American Indian Law* (1981). Upon the arrival of white settlers, the sovereignty of the tribes diminished, as first the British and then the United States governments asserted ownership of Cherokee lands. Under the Treaty of New Echota of 1835, the Cherokee Nation ceded all lands east of the Mississippi River to the United States and agreed to move west. About 1,200 Cherokees eluded the forced removal, however, and remained in North Carolina, where their rights and status were somewhat uncertain for many years. Following a rather complex series of land transactions, the Cherokee reservation, known as the Qualla Boundary lands, was established in western North Carolina. In 1924, pursuant to an act of Congress, 43 Stat. 376, the United States took title to the Cherokee land, holding those lands in trust for the benefit of the Eastern Band and placing certain restrictions upon alienation and taxation of the land, *United States v. Wright*, *supra*. The term of the trust relationship was extended indefinitely by the Indian Reorganization Act of 1934, 48 Stat. 984.

4. F. Cohen, *supra* n. 1, at 242, *United States v. Wheeler*, 435 U.S. 313 (1978).

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The foregoing brief history of the Eastern Band sufficiently illustrates the drastic changes in the relationship between the Eastern Band and the state and federal governments. Before 1835, the North Carolina Cherokees were members of a separate, sovereign nation with inherent powers of self-government. By the terms of the Treaty of New Echota, the federal government, through its plenary power over Indians, provided that those Cherokees remaining in the state would thereafter be subject to state law. By 1868, the North Carolina Cherokees were accorded state citizenship.

Meanwhile, the Cherokees' relationship with the federal government continued to evolve as federal policies toward Indians changed. As early as 1868 Congress instructed the Secretary of the Interior to take "the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."⁵ Later acts of Congress also indicated that the Eastern Band had been accorded full tribal status by the federal government, despite the fact that tribal members were also citizens of North Carolina.⁶

Federal recognition of the Eastern Band as an Indian tribe has at least two major implications for the issue of state jurisdiction: (1) the federal government continues to maintain plenary power over the Eastern Band, a fact which strictly limits extensions of state power, *Williams v. Lee*, 358 U.S. 217 (1959), S. Sherick, "State Jurisdiction Over Indians As A Subject of Federal Common Law: The Infringement-Preemption Test," 21 Ariz. L. Rev. 85 (1979), and (2) the Eastern Band, like all recognized Indian

5. Act of 27 July 1868, 15 Stat. 228.

6. See, e.g., Act of 4 June 1924, 43 Stat. 376, authorizing the federal government to hold the Cherokee lands in trust for the benefit of the members of the Eastern Band, thereby establishing the same relationship between the Eastern Band and the federal government as that between the federal government and other recognized tribes; 46 Fed. Reg. 35361, 8 July 1981, including the Eastern Band as among tribal entities which have a government-to-government relationship with the United States. The fact that the Eastern Band is a remnant of a larger group of Indians, that federal supervision over the tribe has not been continuous and that the Treaty of New Echota conferred state citizenship on the Eastern Band does not mean that the state may assume the federal government's plenary power to deal with Indians, *United States v. John*, *supra* n. 1 (asserting federal plenary power over the Mississippi Choctaw Indians, with a tribal history very similar to that of the Eastern Band).

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tribes, possesses the status of a "domestic dependent nation"⁷ with certain retained inherent sovereign powers, *accord*, *Eastern Band of Cherokee Indians v. Lynch*, 632 F. 2d 373 (4th Cir. 1980). These two principles also constitute the test for determining the scope of state court jurisdiction over members of an Indian tribe, referred to by some authorities as the infringement-preemption test.⁸

Under the preemption prong of the test, state power over Indian tribes is determined in light of the federal government's plenary power over all Indians. State regulations which conflict with federal enactments are void, and even if there is no directly conflicting federal enactment, state action may be barred if Congress has indicated an intent to "occupy the field" and prohibit parallel state action. S. Sherick, *supra* at 88. *See e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

If there is no applicable federal enactment, the state action must be examined under the infringement prong of the test, to determine if tribal sovereignty has been infringed upon. S. Sherick, *supra* at 87, F. Cohen, *Handbook of Federal Indian Law*, at 349-50 (1982).

In applying the infringement-preemption test to the facts before us, we turn first to examine the validity of the July 1980 default judgment. Defendant contends that by 1953 at the very latest, Congress had enacted legislation which preempted the field of Indian law and eliminated state court jurisdiction except as provided by the Act. Defendant contends that Public Law 280, codified at 18 U.S.C. § 1162 (1976 & 1983 Supp.); 28 U.S.C. § 1360 (1976 & 1983 Supp.) provides the exclusive method by which states can assume jurisdiction over Indians residing within their borders. Under the terms of P.L. 280, five states (later six), were

7. The term first appeared in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and was apparently coined by Chief Justice Marshall. For a detailed discussion of the retained sovereign powers of Indian tribes, *see* W. Canby, *American Indian Law* (1981) and F. Cohen, *supra* at 229-52.

8. *See* S. Sherick, *supra*. The actual term "preemption" was first used in reference to Indian law in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), but the notions that federal law can preempt state legislation and that state law might be barred if it infringes upon tribal sovereignty appear in many earlier decisions. *See e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959).

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automatically granted "jurisdiction over civil causes of action . . . to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action."⁹ Section seven of the act, which has since been repealed, permitted states other than the five which were ordered to assume jurisdiction, to obtain jurisdiction by legislative action if they so desired. North Carolina was not among the states ordered to assume jurisdiction, nor has our legislature acted to assume jurisdiction under section seven of the act.

In 1968, the Indian Civil Rights Act¹⁰ was enacted, permitting states to assume jurisdiction over civil cases involving Indians and arising in Indian country by consent of the tribe affected. The Eastern Band has never given formal consent to the assumption of state jurisdiction pursuant to the Indian Civil Rights Act, *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E. 2d 577, *disc. rev. denied*, 298 N.C. 300, 259 S.E. 2d 915 (1979).

Defendant contends that passage of P.L. 280 and the Indian Civil Rights Act preempted the entire field of state jurisdiction over Indians, and that states which have not acted pursuant to the federal legislation are without jurisdiction over civil cases arising on reservations. The United States Supreme Court, however, has recently recognized that prior, lawfully assumed state jurisdiction over some civil cases involving Indians survived the passage of P.L. 280. In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, --- U.S. ---, 52 U.S.L.W. 4647 (1984), the Court noted that "[n]othing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction."¹¹

9. 28 U.S.C. § 1360(a). States could also assume criminal jurisdiction pursuant to P.L. 280, 18 U.S.C. § 1162.

10. 25 U.S.C. §§ 1301-1341 (1976 & 1983 Supp.). For a discussion of the Indian Civil Rights Act, see F. Cohen, *supra* n. 1 at 666-670.

11. The Court's language in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, --- U.S. ---, 52 U.S.L.W. 4647 (1984), while admittedly dicta, seems to indicate that the passage of P.L. 280 was not meant to eliminate all state jurisdiction acquired outside the provisions of the act. After stating the principle that prior, lawfully assumed state jurisdiction might survive

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Plaintiff, on the other hand, contends that the state obtained jurisdiction over the Eastern Band pursuant to the Treaty of New Echota and that this jurisdiction was not divested by the passage of P.L. 280, the Indian Civil Rights Act, or any other action of Congress. We agree. The purpose¹² of P.L. 280 was to provide law enforcement for reservations which lacked adequate law enforcement and means of dispute settlement. At least through 1980, the members of the Eastern Band were free to avail themselves of the state courts for settlement of their disputes. We do not believe that Congress intended to preempt state court jurisdiction where the Indian tribe had no court system of its own. A rule holding that P.L. 280 was intended to cut off state jurisdiction over civil suits between reservation Indians which had no tribal court system would have had the opposite effect from that intended by Congress, by depriving the tribe of the state court forum, without providing an alternative. Our position is strengthened both by the language of *Wold, supra*, and by the failure of Congress to enact specific legislation barring assertion of North Carolina jurisdiction despite notice of the operation of state courts in this area for nearly thirty years.¹³

P.L. 280, the Court cautions that exercise of such jurisdiction will be improper where it would unduly infringe upon the tribe's right of sovereignty. The Court noted that "[a]s a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country. The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted."

Judge Johnson's concurrence in our opinion interprets this language to mean that P.L. 280 preempted prior state jurisdiction over cases in which all parties are Indians, and that only cases involving a non-Indian could have survived passage of P.L. 280. We disagree. The foregoing language is not addressed to the preemptive effect of P.L. 280, but rather, the issue of what surviving state court jurisdiction may be exercised in light of the prohibition against infringement upon tribal authority. The answer must be reached by examining the facts of each case, including the nature of the state jurisdiction sought to be exercised and the degree of tribal autonomy, rather than a sweeping categorization based simply upon the tribal membership of the parties in a lawsuit.

12. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

13. In *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), the Yakima Indian Nation contended that the tribe's right of self-government, guaranteed by an 1855 federal treaty, must have continued after 1953 as it was not expressly abrogated by the terms of P.L. 280. The Court rejected the tribe's argument,

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Decisions of the United States Supreme Court which seem to indicate that P.L. 280 and the Indian Civil Rights Act are the sole means by which a state may obtain jurisdiction over civil suits involving Indians are distinguishable on the grounds that none of the decided cases deal with an assertion of jurisdiction by a state pursuant to a treaty, over an Indian tribe without a tribal court system of its own.¹⁴ A contrary rule, while perhaps under a literal interpretation of broadly-worded statutes, would serve neither

noting that "[a]lthough we have stated that the intention to abrogate or modify a treaty is not to be lightly imputed . . . this rule of construction must be applied sensibly. . . . To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do. The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280." *Id.* at 478 n. 22.

We find nothing inconsistent with our holding today in the foregoing language of *Yakima Nation*. Applying P.L. 280's preemptive effect to the Yakima Nation only transferred dispute settlement from the tribe to the state courts. Application of P.L. 280 to the Eastern Band of the Cherokee before 28 July 1980 however would have left tribal members without a forum for civil cases arising between Indians on the reservation. Such a result cannot constitute a "sensible construction" of the effect of P.L. 280 upon the Treaty of New Echota.

14. For instance, in *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971), a storeowner sued members of the Blackfeet Indian tribe on a debt arising from the Indians' purchase of groceries from a reservation store. The Supreme Court of Montana held that the state courts possessed subject matter jurisdiction, pursuant to a 1967 tribal law which provided for concurrent state and tribal jurisdiction over actions wherein the defendant was a member of the tribe. The United States Supreme Court reversed, on the ground that Montana had not acted to assume jurisdiction pursuant to P.L. 280. The Court noted that P.L. 280 made no provision for assumption of state jurisdiction by consent of the tribe, and that the Indian Civil Rights Act of 1968 permitted state jurisdiction with consent of the tribe only if consent was given by a majority vote of all members of the tribe.

In *Fisher v. District Court*, 424 U.S. 382 (1976), members of the Northern Cheyenne Tribe sought to adopt another member of the tribe who lived on the reservation. A tribal ordinance passed in 1966 purported to provide that the tribe had exclusive jurisdiction over cases involving adoptions of tribal members. The Montana Supreme Court disagreed, however, and held that the state court had subject matter jurisdiction over tribal adoption proceedings prior to 1935, when the Northern Cheyenne Tribal court and government was set up pursuant to federal law. The Montana court held that the unilateral tribal action could not divest the state court of jurisdiction. On appeal, the United States Supreme Court reversed, holding that the assertion of state court jurisdiction over tribal adoptions would unduly infringe upon tribal sovereignty. The Court held that even if Montana had possessed jurisdiction prior to 1935, its jurisdiction was preempted by the 1935 federal statute which permitted the Northern Cheyenne Tribe to set up its government and courts.

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the congressional purpose behind P.L. 280 nor the ultimate welfare of the members of the Eastern Band, as it would require the invalidation of nearly thirty years of state court judgments voluntarily sought by members of the Tribe. We hold, therefore, that Congress has not preempted the field of state court assumption of subject matter jurisdiction over tribes which are without their own court system.

We turn now to the infringement prong of the test to determine if assertion of state jurisdiction in 1980 unduly infringed upon the Eastern Band's inherent right of self-government. While the Eastern Band has a great interest in regulating the domestic relations of its members, it does not appear to us that entry of the default judgment unduly infringed upon tribal sovereignty, as the tribe at that time had chosen not to exercise its rights of self-government in the area of dispute resolution. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, supra*. Defendant's contention that the Swain County District Court lacked subject matter jurisdiction to enter the 1980 default judgment must therefore be overruled.¹⁵ *Accord, Little Horn State Bank v. Stops*, 170 Mont. 510, 555 P. 2d 211 (1976), cert. denied, 431 U.S. 924 (1977), see also *Sasser v. Beck, supra*, affirming the trial court's jurisdiction over a civil action occurring on the reservation, but failing to employ federal preemption doctrine analysis in reaching its results.¹⁶ F. Cohen, *supra* at 350.

15. It is unclear whether the Court of Indian Offenses is required by federal law to accord full faith and credit to the valid 1980 state court judgment against defendant. Normally, under the Full Faith and Credit Clause of the United States Constitution, Art. IV § 1, states must recognize the laws and proceedings of sister states and the proper judgments of their courts. Congress has extended the application of the Full Faith and Credit Clause to United States territories and possessions by statute, but courts are divided over the question whether the doctrine applies to Indian tribes. See F. Cohen, *supra* at 384-85. Even in cases in which a court is not required to accord full faith and credit to the judgment of another court, the court may recognize the judgment under principles of comity, *Id.*

16. *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E. 2d 577, disc. rev. denied, 298 N.C. 300, 259 S.E. 2d 915 (1979), appears to be the only other decision of our appellate courts dealing with the question of state court authority to hear civil cases arising on the reservation and involving a member of the Eastern Band, prior to establishment of the tribal court system. We do not decide today the impact of establishment of tribal courts upon the authority of state courts to hear criminal cases involving members of the Eastern Band. State courts asserted jurisdiction over criminal cases involving Indians prior to the establishment of the Indian

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We now consider whether the state court retained jurisdiction to enforce the default judgment once the tribal court began operation on 28 July 1980. Plaintiff correctly notes that as a general rule, subject matter jurisdiction is determined when the initial complaint is filed, and later events do not deprive the court of jurisdiction. *In re Peoples*, 296 N.C. 190, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929 (1979), 20 Am. Jur. 2d *Courts* §§ 142, 148 (1965 & 1983 Supp.). It is also true that while a court loses jurisdiction over a cause after it renders a final decree, it retains jurisdiction to correct or enforce its judgment, *Whitmer v. Whitmer*, 243 Pa. Super. 462, 365 A. 2d 1316 (1976), *cert. denied*, 434 U.S. 822 (1977); *State ex rel. Taylor v. Carey*, 74 Mont. 39, 238 P. 597 (1925); 21 CJS *Courts* § 94 (1940 & 1983 Cum. Supp.). This general rule, however, is insufficient to override application of the infringement-preemption test to this case. *Accord Joe v. Marcum*, 621 F. 2d 358 (10th Cir. 1980).

We need not reach the issue whether state court jurisdiction was preempted by federal legislation after 28 July 1980, as the question before us may be resolved under the infringement prong of the test. It is clear that any exercise of state power after the creation of the Indian court system would unduly infringe upon the tribe's asserted right of self-government. *Williams v. Lee*, *supra*. Accordingly, we hold that the judgment of the Swain County District Court of 3 May 1983 must be reversed and remanded.

Reversed and remanded.

Judge BECTON concurs.

Judge JOHNSON concurs in the result.

Judge JOHNSON concurring in the result.

I concur in the reversal of the Swain County District Court order holding defendant in contempt for failure to comply with a

courts in the following cases: *State v. McAlhaney*, 220 N.C. 387, 17 S.E. 2d 352 (1941); *State v. Adams*, 213 N.C. 243, 195 S.E. 822 (1938); *State v. Wolf*, 145 N.C. 441, 59 S.E. 40 (1907); *State v. Ta-Cha-Na-Tah*, 64 N.C. 614 (1870); *State v. Dugan*, 52 N.C. App. 136, 277 S.E. 2d 842, *appeal dismissed*, 303 N.C. 711, 283 S.E. 2d 137 (1981).

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1980 default judgment requiring him to pay child support for the parties' two illegitimate children. However, I do so on the ground that both the 1983 contempt order and the 1980 default judgment are void for lack of jurisdiction over the subject matter of the lawsuit. In my opinion, the majority's analysis of the scope of this state's judicial jurisdiction over members of an Indian tribe under the "infringement-preemption" test is flawed by the failure to recognize that Public Law 280, codified at 18 U.S.C. § 1162 (1976 & 1983 Supp.); 28 U.S.C. § 1360 (1976 & 1983 Supp.), has been repeatedly interpreted by the United States Supreme Court as a preemptive statute which provides the sole and exclusive means by which a state may assume effective jurisdiction over civil causes of action between members of an Indian tribe which arise in Indian country. Consequently, North Carolina's failure to acquire jurisdiction under the provisions of Public Law 280 has had the unavoidable consequence of leaving the courts of this state without effective jurisdiction over the conduct and activities of Cherokee Indians when they are within the confines of the Cherokee Indian Reservation.

At the outset, it must be remembered that although the subject of jurisdiction over Indian tribes is one in which "generalizations . . . have become particularly treacherous," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed. 2d 114, 119 (1973), the decisions of the United States Supreme Court have established several basic principles with respect to the boundaries between state regulatory and jurisdictional authority and the right of tribal self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed. 2d 665 (1980).

Although the Court early recognized that Indians and their lands constitute a sovereign and semi-independent entity, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886), the Court has long departed from the view of *Worcester* that the laws of a state can have "no force" within reservation boundaries. *White Mountain*, *supra*. Nevertheless, the Court has continued to recognize that the Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed. 2d 706, 716 (1975).

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The status of the tribes has been described as “‘an anomalous one and of complex character,’” for despite their partial assimilation into American culture, the tribes have retained “‘a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.’” *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 173, [93 S.Ct. 1257, 1263, 36 L.Ed. 2d 129, 136] (1973), *quoting United States v. Kagama*, 118 U.S. 375, 381-382, [6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228, 230] (1886).

White Mountain, supra, at 142, 100 S.Ct. at 2583, 65 L.Ed. 2d at 672.

Federal power over Indians is usually described as “plenary,” and its source is most often discussed in court opinions by reference to three constitutional provisions: the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3; the Treaty Clause, U.S. Const. art. II, § 2, cl. 2; and the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See generally* F. Cohen, *Handbook of Federal Indian Law*, 207-212 (1982). “For most purposes it is sufficient to conclude that there is a single ‘power over Indian affairs,’ an amalgam of the several specific constitutional provisions.” *Id.* at 211.

This broad congressional power to regulate tribal affairs and the “semi-independent position” of Indian tribes has given rise to the two independent, but related barriers to the assertion of state regulatory and adjudicatory authority over tribal reservations and members—preemption of state authority by federal law and unlawful infringement on “the right of reservation Indians to make their own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed. 2d 251, 254 (1959). Consequently, “[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important ‘backdrop’ . . . against which the vague or ambiguous federal enactments must always be measured.” *White Mountain, supra* at 143, 100 S.Ct. at 2583, 65 L.Ed. 2d at 672. (Citation omitted.)

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F. Cohen, in his *Handbook of Federal Indian Law*, *supra*, at 349, has summarized relevant principles for determining the extent of state jurisdiction over Indian defendants within Indian country absent federal delegation.

Within Indian country state jurisdiction is preempted both by federal protection of tribal self-government [*McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973)] and by federal statutes on other subjects relating to Indians, tribes, their property, and federal programs [*United States v. Mazurie*, 419 U.S. 544 (1975)]. Federal protection of tribal self-government precludes either criminal or civil jurisdiction of state courts over Indians or their property absent the consent of Congress [*United States v. John*, 437 U.S. 634 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976)] . . . State jurisdiction is precluded even over what are commonly designated as transitory causes of action. (Footnotes omitted.)

I

The majority's conclusion that the 1980 default judgment was valid when entered rests upon the assumption that the state obtained jurisdiction over the Eastern Band pursuant to the Treaty of New Echota, 7 Stat. 478 (1835), and that this jurisdiction was not divested by the passage of Public Law 280, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1976 & 1983 Supp.) or any other act of Congress. Thus, the threshold issue raised by this appeal is whether the legal status of the members of the Eastern Band of Cherokees differed materially from that of other federally recognized Indian tribes at the time Public Law 280 was enacted.

Historically, the federal government has determined that certain groups of Indians will be recognized as tribes for various purposes, incident to the Indian Commerce Clause of the Constitution. When Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination. F. Cohen, *supra*, at 3. The Fourth Circuit Court of Appeals recently addressed the issue of the legal status of the Eastern Band under the Treaty of New Echota with respect to the right of North Carolina to impose a tax on income earned by members of the Eastern Band on the reservation and upon their personal property on the reservation. *Eastern Band of Cherokee Indians v.*

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Lynch, 632 F. 2d 373 (4th Cir. 1980). In *Lynch*, no federal statute expressly preempted the state's authority to impose the subject taxes; however, no federal statute expressly permitted the state to levy the taxes. The court first reviewed the course of the Eastern Band's relationship to the state of North Carolina and to the United States from the eighteenth to the early twentieth century, *Id.* at 375-377, and concluded that since the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, Congress has consistently referred to the Eastern Band property as the "Cherokee Indian Reservation" or the "Eastern Cherokee Reservation." 632 F. 2d at 377.

Relevant opinions of the Department of Interior's Solicitor have stressed that despite the state citizenship of tribe members, the federal government has treated the Eastern Band "in every respect" as an Indian tribe, and the lands held in trust as an Indian reservation. (Footnotes omitted.)

*Id.*¹

Next, the court reviewed its own opinions since 1934, which have all acknowledged federal guardianship over the Band.

We have held that federal law preempts North Carolina jurisdiction over proceedings affecting the trust lands, and we have refused to apply North Carolina adverse possession laws to suits involving the reservation. We have also rejected contentions that the Eastern Band is not an Indian tribe and that the land it occupies is not an Indian reservation within the meaning of federal Indian trading statutes. We have held that the right to sue the Eastern Band is dependent upon the consent of the United States, and we have recognized that Congress has not conferred jurisdiction on federal courts to monitor tribal elections. Finally, we have found that federal preemption bars North Carolina from enforcing its fishing license requirement against non-Indian fishermen on the Band's reservation. (Footnotes omitted.)

632 F. 2d at 377-378.

1. For an extensive examination of the legal status of the Eastern Band, see Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C. L. Rev. 1075 (1980).

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The Court summarized its historical examination of the Band's legal status as follows:

This abridged history demonstrates that the Act of 1924 [which included the Eastern Band property in the federal allotment program] significantly altered the relationship of the Band both to North Carolina and to the United States. After the 1924 conveyance in trust, notwithstanding the earlier history of the Eastern Band, the relationship of the United States to both the Band and the land upon which its members reside mirrored the relationship of the United States to the large number of tribes and reservations included in the General Allotment Act of 1887. [Par.] We repeat what our cases have decided: the members of the Eastern Band of Cherokees have a dual status. They are citizens of North Carolina. Nevertheless, they are a federally recognized Indian tribe, and the land on which they earn their livelihood is a federally recognized Indian reservation held in trust for their benefit by the United States.

Id. at 378.

The *Lynch* court then set about to reconcile the problem of the dual status of the members of the Eastern Band with North Carolina's claim that the Treaty of New Echota established the state's right to impose the taxes at issue. The court first stated that the governing principle in the analysis of the status of Indians who were both citizens of North Carolina and also Indians living on an Indian reservation held in trust by the United States for their benefit was that the Constitution, treaties and federal laws pertaining to Indians are preeminent, citing *Worcester v. Georgia*, *supra*. On the basis of the rationale developed by the United States Supreme Court in *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed. 2d 489 (1978), for reconciling the problem of dual status Indians with state claims of jurisdiction, the *Lynch* court rejected North Carolina's argument that the Treaty of New Echota established the state's right to impose the income and personal property taxes at issue. The court then held that the members of the Eastern Band were not required to show express federal exemption from state taxation to avoid imposition of the disputed taxes and that the lack of congressional consent to impose an income or personal property tax on members of the East-

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ern Band precluded the levy of such taxes by North Carolina. In other words, federal preemption, standing alone, was found to be a sufficient bar to the state's authority to levy the taxes at issue. 632 F. 2d at 381, n. 40.

The holding in *Lynch* is premised upon the court's conclusion that it is the *current status* of the Eastern Band as a federally recognized tribe residing on an Indian reservation, rather than their North Carolina citizenship which determines the state's power to tax. 632 F. 2d at 380, *citing by implication, Moe v. Salish & Kootenai*, 425 U.S. 463, 467, 96 S.Ct. 1634, 1638, 48 L.Ed. 2d 96, 103 (1976) (Montana not permitted to levy a personal property tax on automobiles owned by reservation Indians despite Court's acknowledgment that the Indians were citizens of Montana). This conclusion was reached under the rationale developed in *United States v. John*, *supra*, in which the United States Supreme Court rejected Mississippi's claim of jurisdiction to try a Choctaw Indian for a crime committed on the Choctaw Reservation under the Treaty at Dancing Rabbit Creek, 7 Stat. 333 (1830). As the *Lynch* Court noted, the history of the Choctaws' relationship to Mississippi and the federal government "remarkably parallels that of the Eastern Band." 632 F. 2d at 378. Because of its direct bearing on the case under discussion, a brief examination of the *John* opinion is necessary.

The issue before the Court in *John* was whether the federal government had exclusive jurisdiction over a Choctaw Indian pursuant to 18 U.S.C. §§ 1151 and 1153, for a criminal offense committed on the Choctaw reservation. 18 U.S.C. § 1153 makes any Indian who commits certain specified offenses (major crimes) within "Indian country" subject to the exclusive criminal jurisdiction of the United States. 18 U.S.C. § 1151 defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." It is of note here that this definition of "Indian country" is also used for purposes of civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed. 2d 300 (1975).

In *John*, Mississippi contended that the Choctaw reservation was not "Indian country" because (1) the Choctaws of Mississippi were merely a remnant of a larger group of Indians, long ago removed from Mississippi, (2) federal supervision over the Choc-

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taws had not been continuous, and (3) the Treaty at Dancing Rabbit Creek extended state citizenship to Choctaws who remained in Mississippi. The Supreme Court rejected each of the state's contentions and held that the federal statutes operated to vest exclusive jurisdiction in the federal courts and precluded the exercise of state criminal jurisdiction over the enumerated offenses committed on the Choctaw lands, despite the earlier history of the tribe.

That history may be summarized as follows: In 1830, the Choctaw Nation entered into the Treaty at Dancing Rabbit Creek, which ceded to the United States all lands east of the Mississippi still occupied by the Choctaws and stipulated that the Nation would remove to lands west of the river. As with the Treaty of New Echota, the Treaty at Dancing Rabbit Creek provided that the Indians who remained in the east could become citizens of their respective states. Federal supervision over those Choctaws who remained in Mississippi, which was not continuous during the nineteenth century, was resumed in the early twentieth century; lands were then purchased, an allotment program instituted; and, as with the Eastern Band, the United States eventually took title in trust for all lands originally purchased for the Mississippi Choctaws.

The Supreme Court's rejection of Mississippi's jurisdictional claims on the basis of the tribe's state citizenship is directly relevant to the issues in the case under discussion. As to the historical justification given for Mississippi's assertion of jurisdiction over the tribe and its lands, the Court stated:

We assume for purposes of argument, as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But, particularly in view of the elaborate history, recounted above, of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal

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power to deal with them. *United States v. Wright*, 53 F. 2d 300 (CA4 1931), *cert. denied*, 285 U.S. 539, [52 S.Ct. 312, 76 L.Ed. 932] (1932).

437 U.S. at 652-653, 98 S.Ct. at 2551, 57 L.Ed. 2d at 502.

The court then addressed the state's argument that the assertion of exclusive criminal jurisdiction over the Choctaws by the federal government would be inconsistent with the terms of the Treaty at Dancing Rabbit Creek whereby the Mississippi Choctaws became state citizens:

This argument may seem to be a cruel joke to those familiar with the history of the execution of that treaty, and of the treaties that renegotiated claims arising from it. . . . And even if that treaty were the only source regarding the status of these Indians in federal law, we see nothing in it inconsistent with the continued federal supervision of them under the Commerce Clause. It is true that this treaty anticipated that each of those electing to remain in Mississippi would become "a citizen of the States," but the extension of citizenship status to Indians does not, in itself, end the powers given Congress to deal with them. (Citations omitted and emphasis added.)

437 U.S. at 653-654, 98 S.Ct. at 2551, 57 L.Ed. 2d at 502-503. Since the statute providing a basis for the federal prosecution of the defendant is *John* is ordinarily preemptive of state jurisdiction when it applies, Mississippi was precluded from exercising its jurisdiction over the Indian defendant for the same offense, despite the "dual status" of the Choctaws.

As the Fourth Circuit Court of Appeals recognized in *Lynch*, it is evident that the rationale of *John* is controlling on the question of whether the 1835 Treaty of New Echota immutably fixed the dominion of North Carolina over the Eastern Band in the face of subsequent federal statutes. 632 F. 2d at 380. The answer under *John* is emphatically that it did not. The Supreme Court's phraseology in rejecting Mississippi's jurisdictional claim under the Treaty at Dancing Rabbit Creek as a "cruel joke" leads to no other conclusion.

Taken together, *Lynch* and *John* establish the following principles with regard of the "dual status" of the Eastern Band:

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1. By virtue of the 1835 Treaty of New Echota, the Eastern Band of Cherokees are citizens of North Carolina.
2. They are, nevertheless, a federally recognized Indian tribe, living on an Indian reservation held in trust by the United States for their benefit. Act of June 4, 1924, 43 Stat. 376; Act of June 18, 1934, 48 Stat. 984.
3. Neither the fact that at times the State's exercise of jurisdiction over the Indians and their land went unchallenged, nor the fact that federal supervision over the particular Indian group has not been continuous, destroys the preeminent federal power to deal with them.
4. Jurisdictional controversies between the states and Indian tribes having a "dual status" deriving from early treaties of removal are to be resolved by looking at the current status of the Indians under federal Indian law; the dominion of North Carolina over the Eastern Band, established by the 1835 Treaty of New Echota is not immutable.

From the foregoing discussion it is evident that despite the earlier history of the Eastern Band, the federal government's resumption of supervision over their affairs in the late nineteenth and early twentieth centuries must be considered determinative of their legal status as a federally recognized Indian tribe. The relationship of the United States to both the Band and the land upon which it resides, then, had not materially differed from the federal government's relationship with other Indian tribes by 1934, or at the latest, by the time of the codification of Title 18 in 1948, which by definition, had the effect of reconstituting the Eastern Band reservation as "Indian country," 18 U.S.C. § 1151, "under the jurisdiction of the United States Government," for purposes of the Major Crimes Act, 18 U.S.C. § 1153. As noted above, this definition is also used for purposes of civil jurisdiction. *DeCoteau v. District County Court, supra*.

Having concluded that the federal supervisory authority over the Eastern Band was neither terminated nor diminished by the Treaty of New Echota, and that their legal status did not differ materially from that of other Indian tribes, the question then becomes whether the enactment of Public Law 280 in 1953 had the effect of preempting North Carolina's jurisdiction over civil

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causes of action arising between members of the Eastern Band with regard to on-reservation conduct. I find no indication, in either the statutory language itself, the legislative history, or in recent Supreme Court cases interpreting Public Law 280, that Congress intended to exempt North Carolina from the preemptive operation of the statute.

II

Again, in resolving the issue of whether the passage of Public Law 280 and the Indian Civil Rights Act preempted the entire field of state jurisdiction over Indian parties for on-reservation conduct, it must be remembered that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." *White Mountain, supra*, at 143, 100 S.Ct. at 2583, 65 L.Ed. 2d at 672. Furthermore, "[t]he tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law." *Id.* "Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143-144, 100 S.Ct. at 2584, 65 L.Ed. 2d at 673. It is with these principles in mind that Public Law 280 must be examined.

A

Public Law 280 was the first federal jurisdictional statute of general applicability to Indian reservation lands. See Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535 (1975). By its terms, the Act effected the immediate cession of criminal and civil jurisdiction over Indian country to five states, with an express exception for the reservations of certain tribes within those states. Public Law 280, §§ 2 and 4. North Carolina was not among the states given immediate jurisdiction.

Two separate provisions of Public Law 280 are potentially applicable to states not granted immediate jurisdiction. The first, Section 6, not applicable to North Carolina, covers states whose constitutions or enabling statutes contained organic law disclaimers of jurisdiction over Indian country. The people of those states were given permission to amend "where necessary" their state

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constitutions or existing statutes to remove any legal impediment to the assumption of jurisdiction under the Act. As the Supreme Court has observed, "*All others were covered in § 7.*" *Washington v. Yakima Indian Nation*, 439 U.S. 463, 474, 99 S.Ct. 740, 748, 58 L.Ed. 2d 740, 752 (1979) (emphasis added).

Section 7, by its terms, gave the remaining states an option to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the tribes that would be affected.² Section 7 provides in full as follows:

The consent of the United States is hereby given to *any other State not having jurisdiction* with respect to criminal offenses or civil causes of action, or with respect to both, *as provided for in this Act*, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof. (Emphasis added.)

As the majority noted, North Carolina has not assumed jurisdiction over the Eastern Band by affirmative legislative action under Section 7. The language of Section 7 is clear and unambiguous. *Any* other state not having jurisdiction "as provided for in this Act"—that is, not acquiring immediate jurisdiction under Sections 2 and 4, and not falling under the coverage of Section 6—was given the consent of Congress to assume jurisdiction "by affirmative legislative action." No state, including North Carolina, was expressly exempted from the operation of this, or any other provision of the Act. Where Congress did intend to exempt certain reservations within the mandatory states, it specifically mentioned those reservations in the Act itself. *See* Sections 2 and 4. Therefore, the statutory language supports the conclusion that Congress intended Public Law 280 to preempt the entire field of state court civil jurisdiction over actions between Indians. Accordingly, the mode of procedure established by Section 7 is the exclusive means by which North Carolina could have acquired such civil jurisdiction, prior to 1968.

2. Section 7, for this reason, was much criticized and was eventually repealed. The 1968 Indian Civil Rights Act, codified at 25 U.S.C. §§ 1301-1341 (1976 & 1983 Supp.), provided that states could assume jurisdiction over cases involving Indians and arising in Indian country only by consent of the tribe affected.

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Additional textual support for this construction of Public Law 280 may be gleaned from the provisions limiting the scope of civil jurisdiction ceded by the Act to both the mandatory and optional states. Subsections (b) and (c) of Section 4 limit, respectively, a state's ability to regulate certain property and water rights, land use, and probate matters within Indian country, and the choice of law in civil cases brought to state court. Subsection (c) states:

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

The placement of these restrictions on the scope of the civil jurisdiction ceded by Public Law 280 argues against the conclusion that any state was impliedly exempted from the operation of the Act, because such a state would not be subject to these limitations in the exercise of its civil jurisdiction. In discussing this provision, F. Cohen, *supra*, at 344 states:

The civil law provisions of Public Law 280 expressly preserve the legislative authority of tribes where not inconsistent with applicable state civil law. The wording of the section shows that its purpose is to require that such tribal laws be recognized in state courts. . . .

It appears unlikely, given the federal policy of encouraging tribal self-government embodied in these restrictions on state jurisdiction, that Congress would have intended the anomalous result of leaving North Carolina totally unrestricted with regard to its civil jurisdiction.

Furthermore, I am unpersuaded by the majority's reasoning that the state's assertion of jurisdiction pursuant to the Treaty of New Echota was completely unaffected by the enactment of Public Law 280. The identical argument was put forth by the Yakima Indian Nation in *Washington v. Yakima Indian Nation*, *supra*, and summarily rejected by the Supreme Court. The primary issue before the Court in that case was whether Washington was required to amend its constitution before it could validly legislate under

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the authority of Public Law 280. The Tribe argued, *inter alia*, that under its 1855 Treaty with the United States, Act of June 9, 1855, 12 Stat. 951, it was guaranteed a right of self-government that was not expressly abrogated by Public Law 280. The Court's rejection of this argument is directly relevant to the assertion of North Carolina's purported jurisdiction pursuant to the Cherokees' 1835 Treaty with the United States and it bears repetition in full:

The argument assumes that under our cases . . . treaty rights are preserved unless Congress has shown a specific intent to abrogate them. Although we have stated that the intention to abrogate or modify a treaty is not to be lightly imputed . . . This rule of construction must be applied sensibly. In this context, the argument made by the Tribe is tendentious. *The treaty right asserted by the Tribe is jurisdictional. So also is the entire subject-matter of Pub. L. 280. To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do. The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280.* (Citations omitted and emphasis added.)

439 U.S. at 478, n. 22, 99 S.Ct. at 750, 58 L.Ed. 2d at 754.

Therefore, it appears that the Supreme Court has already resolved the issue of whether Congress intended to abrogate inconsistent treaty rights and provisions of a jurisdictional nature by the enactment of Public Law 280. The conclusion reached is consistent with the Court's more general statements. Public Law 280 is a preemptive jurisdictional act of *general applicability* which abrogated all potentially conflicting treaty rights by its *express terms*. In light of the general rule of construction applicable to congressional statutes claimed to terminate Indian immunities—that doubts be resolved in favor of tribal self-government, *see, e.g., White Mountain, supra*—the Court's ready imputation of a congressional intention to abrogate prior treaties from the express terms of Public Law 280 alone is particularly significant. This is so because the effect of imputation in that case was to abrogate the Yakima Nation's right to self-government. The

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Court's holding in *Yakima Indian Nation* would, therefore, appear to be determinative of North Carolina's jurisdictional claims pursuant to the Treaty of New Echota following the enactment of Public Law 280 in 1953. Any inconsistent Treaty provision was simply abrogated and Section 7 of Public Law 280 became the determinative jurisdictional statute under federal law.

B

The appellee, in her brief, contends that the legislative history of Public Law 280 substantiates North Carolina's claim of civil jurisdiction over the Eastern Cherokee Indians. Much has been written about the legislative history of Public Law 280. *See, e.g.,* Goldberg, *supra*. The primary thrust of Public Law 280 was directed toward the problem of criminal law enforcement and "[m]ost likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations." *Id.* at 543. In *Washington v. Yakima Indian Nation, supra*, the Court discussed the legislative history of Public Law 280 at great length. The Act developed from a bill to confer jurisdiction on California, H.R. 1063, to a series of individual bills to transfer jurisdiction to the "five willing states" which eventually were covered in Sections 2 and 4. It was then transformed into a bill of "general applicability." Section 6, discussed earlier, was added to accommodate states with constitutional prohibitions against jurisdiction.

Public Law 280 was the first jurisdictional bill of general applicability ever to be enacted by Congress. It reflected congressional concern over law-and-order problems on Indian reservations and the financial burdens of continued federal jurisdictional responsibilities on Indian lands . . . It was also, however, without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's . . . (Citations and footnotes omitted.)

439 U.S. at 488, 99 S.Ct. at 755, 58 L.Ed. 2d at 760.

As the Court noted in *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed. 2d 710 (1976), there is a virtual absence of expression of congressional policy or intent respecting Section 4's grant of civil jurisdiction to the States.

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[T]he primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court. [Par] Furthermore, certain tribal reservations were completely exempted from the provisions of Pub. L. 280 precisely because each had a "tribal law-and-order organization that functions in a reasonably satisfactory manner." H.R. Rep. No. 848, p. 7, [U.S. Code Cong. & Admin. News 1953, p. 2413]. Congress plainly meant only to allow state courts to decide criminal and civil matters arising on reservations not so organized. (Footnotes omitted.)

Id. at 385-386, 96 S.Ct. at 2109, 48 L.Ed. 2d at 719.

In *Bryan*, the grant of jurisdiction under Section 4 of Public Law 280 was construed narrowly to preclude state taxing authority. The Court reasoned that the extension of the civil jurisdiction of the states to Indian reservations did not expressly include the power to tax; that such an extension would have the effect of undermining tribal government; and that "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" *Id.* at 388, n. 14, 96 S.Ct. at 2111, 48 L.Ed. 2d at 721, *quoting with approval, Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 655, 663 (9th Cir. 1975). The Court also observed that "[T]he same Congress that enacted Pub. L. 280 also enacted several termination Acts—legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation." *Id.* at 389, 96 S.Ct. at 2111, 48 L.Ed. 2d at 721.

It is evident then, that Public Law 280 is to be narrowly and literally construed in light of evolving federal Indian policy. As was stated in Part I, the language of Public Law 280 regarding those states receiving congressional consent to assume jurisdiction under Section 7 is clear and comprehensive; "any other State not having jurisdiction . . . as provided for in this Act." No state, including North Carolina, was expressly exempted from compliance with either Section 6 or Section 7. Inasmuch as the Act contained specific exemptions for reservations within the states granted immediate jurisdiction, it is reasonable to infer that

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where Congress intended either to include a specific reservation or State or to exempt one from Public Law 280, it did so by express provision. Therefore, I cannot agree with the majority's holding that North Carolina was impliedly exempt from the preemptive operation of the Act.

The appellee, approaching the issue from a different perspective, contends that the explanation for Congress' failure to include North Carolina among the states given immediate jurisdiction under the Act is contained in the testimony of representatives of the Bureau of Indian Affairs during the Hearings on Public Law 280 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (June 29, 1953). Appellee has supplied the full transcript of the Hearing on June 29, 1953 as an appendix to her brief.³

The transcript contains two direct references to the jurisdictional situation with respect to North Carolina. The first is as follows:

Mr. Shuford. What is the situation with regard to North Carolina?

Mr. Benge. I believe that the situation in North Carolina is that there is a federal court decision holding that the Indian reservation there, the Eastern Cherokee Reservation, is under the state law and order jurisdiction.

Mr. Shuford. I was under the impression they did have such an arrangement.

Mr. Benge. I think in 1933 there was a decision by the Circuit Court of Appeals for that circuit which held the reservation to be under the state jurisdiction. I know at the present time the sheriff does some work on the reservation. The tribe

3. See *Washington v. Yakima Indian Nation*, 439 U.S. at 490, n. 35, 99 S.Ct. at 756, 58 L.Ed. 2d at 762, for a list of the primary legislative materials on Public Law 280. The transcripts of the Hearings on H.R. 1063 (the consolidated jurisdictional bill) were apparently not published in reported form. A transcript of the subsequent Hearings on H.R. 1063 before the House Committee on Interior and Insular Affairs 83d Cong., 1st Sess. (July 15, 1953) was not supplied to this Court.

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hires some officers, and they take all their cases into the JP court in Bryson City.

Mr. Shuford. They also have a federal court where they try Indian cases.

Mr. Bengé. Yes, sir; they have some Indian cases in the federal courts there.

Mr. Shuford. Could you give me the citation on that?

Mr. Bengé. I do not have it with me, Congressman, but I can get it for you.

Hearings on H.R. 1063 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 24-25 (June 29, 1953). The "1933 decision" referred to could only have been *United States v. Wright*, 53 F. 2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932 (1932).⁴

Appellee argues that the foregoing testimony, together with the subsequent passage of Public Law 280 without inclusion of North Carolina among the mandatory states, indicates that Congress must have decided that North Carolina was already exercising effective jurisdiction over the Eastern Band and it was, therefore, unnecessary to include North Carolina among the states given immediate jurisdiction.

The second mention of North Carolina in the Hearings, however, tends to undermine this somewhat speculative interpretation. After an exchange on the fact that this was to be "a general bill," the following testimony appears:

4. In *Wright*, the Fourth Circuit Court of Appeals undertook an extensive review of the history of the Eastern Band and its relation to the state and federal governments up to 1931. The court first determined that "there can be no doubt that Congress has the power to legislate for the protection of the Eastern Band of Cherokee Indians and for the regulation of the affairs of the band," 53 F. 2d at 307, and then upheld the constitutionality of the Cherokee Allotment Act, Act of June 4, 1924, 43 Stat. 376, which, *inter alia*, exempted the land conveyed therein from taxation by North Carolina while it was held in trust for the Band by the federal government. Although the decision was based upon the court's determination that the North Carolina "citizenship of the Indians does not affect the power of the [federal] government to exercise guardianship over them," 53 F. 2d at 312, the court also observed *in dictum*, that "the numbers of the band, by separation from

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Mr. Shuford. Mr. Chairman, I would like to be sure about North Carolina, because I think North Carolina might be brought in on that.

Mr. Bengé. There does seem to be some question, Congressman, as to whether or not the codification of Title 18 in 1948 reconstituted the reservation as "Indian country" so as to deny state jurisdiction.

Mr. Shuford. I know they do maintain a deputy sheriff on the reservation.

Mr. Bengé. Yes, sir.

Mr. Shuford. Whether that is by comity I do not know.

Mr. Bengé. It is not clear legally whether the court decision to which I referred is now the law, or whether it is now "Indian country" under Title 18.

Mr. Shuford. Will you advise me about that?

Mr. Bengé. Yes, I will.

Mr. D'Ewart. I move the adoption of the motion.

Hearings on H.R. 1063 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 26 (June 29, 1953).

The subcommittee then voted to report favorably to the Full Committee on H.R. 1063, as amended to cover the mandatory states and all other states.

It is simply not possible to draw any reliable conclusions on the basis of these materials. First, it is clear that at both points in

the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interfered with the exercise of the police power of the state." 53 F. 2d at 307. The court further stated that any such act of Congress must bear a reasonable relation to the *economic welfare* of the tribe, i.e., to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states. This unduly narrow view of the well-established "plenary power" of Congress to enact legislation dealing with the Indian tribes is of questionable validity as a matter of constitutional law. More importantly, for the purpose of this appeal, it is impossible to determine how the seemingly contradictory statements contained in *Wright* would be interpreted by the representatives considering the jurisdictional question.

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the relevant testimony, questions were raised as to the source and continued vitality of North Carolina's exercise of jurisdiction, and no further transcripts indicating the resolution of these issues have been submitted by the appellee. Secondly, an independent examination of the Fourth Circuit Court of Appeals opinion in *United States v. Wright, supra* at note 5, indicates that the thrust of that decision was that federal supervisory authority over the Eastern Band was undiminished by the fact of state citizenship and the references to the Band's being politically subject to the laws of the state were *dicta*. In addition, as the *Lynch* Court pointed out: Since passage of the 1934 Indian Reorganization Act, the Cherokee lands have been recognized as constituting a "reservation" and the Department of Interior's Solicitor's opinions, dating at least since 1942, indicate that the federal government has treated the Eastern Band "in every respect" as an Indian tribe and the lands held in trust as an Indian reservation. 632 F. 2d at 377, n. 22. Finally, the conclusion of the House Report on H.R. 1063 as amended, H.R. Rep. No. 848, 83d Cong., 1st Sess., reprinted in 1953 U.S. Code Cong. & Ad. News 2409, indicates that with the exception of the five states expressly mentioned in Sections 2 and 4 of the Act, and some eight states whose enabling acts and constitutions contain express disclaimers of jurisdiction over Indian reservations, the Interior Department "does not have information on the attitude and disposition of the State and local authorities and the Indian groups in the [other] States." *Id.* at 2414.

Again, the legislative history of Public Law 280 with regard to North Carolina is somewhat ambiguous and inconclusive and does not, therefore, substantiate the state's jurisdictional claim as the appellee contends. It reflects only an awareness in the subcommittee that North Carolina stood in a somewhat unique position with respect to the jurisdictional question, and a definite congressional intent to make Public Law 280 a bill of general applicability. The history fails, however, to indicate any congressional intent to exempt North Carolina from the universally preemptive effect of the Act. Although it was undeniably the purpose and intent of Congress to facilitate the States' assumption of criminal and civil jurisdiction by the passage of Public Law 280, it was also clearly the intent of Congress that each state do so by means of the appropriate procedure established therein; that is,

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either by Section 6 or by Section 7. Although the Act, so construed, would have the unfortunate effect of temporarily cutting off North Carolina's theretofore unchallenged exercise of jurisdiction over the members of the Eastern Band, it also provided the means by which such jurisdiction could be validly acquired: "at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." 18 U.S.C. § 1162. Thus, it was evidently the intent of Congress, from 1953 until 1968, that the decision to exercise a state's jurisdiction over the conduct of Indians within Indian country was to be made by the people of each affected state through affirmative legislative action and not through case by case adjudication in the various state and federal courts. This conclusion is amply supported by the cases arising under Public Law 280 during the last twenty-five years.

C

The Supreme Court has consistently held that Public Law 280 and the Indian Civil Rights Act constitute the sole and exclusive means by which a state may obtain jurisdiction over civil suits involving only Indians within Indian country. *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed. 2d 106 (1976); *Kennerly v. District Court of Montana*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed. 2d 507 (1971); *Williams v. Lee*, *supra*. See also *United States v. John*, *supra* (criminal jurisdiction). The Court has also consistently construed the scope of Public Law 280's delegation of jurisdiction narrowly, in view of the post-1953 movement of federal Indian policy away from assimilation and towards preservation of the right of tribal self-government. See, e.g. *Bryan v. Itasca County*, *supra*; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978) (construing Title I of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, narrowly to protect tribal sovereignty from undue interference). But see *Washington v. Yakima Indian Nation*, *supra* (Section 6 of Public Law 280 did not require disclaimer states to amend their constitutions to make an effective acceptance of jurisdiction; positive legislative action under Public Law 280 is sufficient unless state law requires constitutional amendment).

In *Kennerly v. District Court of Montana*, *supra*, the state of Montana asserted jurisdiction under Public Law 280 on the basis

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of a 1967 Blackfeet Tribal Council action providing that the "Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts." 400 U.S. at 425, 91 S.Ct. at 481, 27 L.Ed. 2d at 510. The Supreme Court first determined that Public Law 280 was a "governing Act of Congress" with regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country. Next, the Court addressed the means by which a state could validly assume such jurisdiction:

Section 7 of that statute conditioned the assumption of state jurisdiction on "affirmative legislative action" by the State; the Act made no provision whatsoever for tribal consent, either as a necessary or sufficient condition to the assumption of state jurisdiction. Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that *the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities.* (Citations omitted and emphasis added.)

Id. at 427, 91 S.Ct. at 482, 27 L.Ed. 2d at 511. Finally, the Court held that in the absence of affirmative legislative action with respect to the Blackfeet Reservation, the unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country under the 1953 Act. *Id.*

Similarly, in *Fisher v. District Court, supra*, the Supreme Court concluded that the Montana state courts lacked jurisdiction over reservation Indian adoption proceedings and held that the Tribal Court of the Northern Cheyenne Tribe had exclusive jurisdiction over an adoption proceeding arising on the Northern Cheyenne Indian Reservation in which all parties are members of the tribe residing on the reservation. The state had not been granted, nor had it assumed, civil jurisdiction over the Northern Cheyenne Indian Reservation under either Public Law 280 or under Title IV of the Civil Rights Act of 1968, 25 U.S.C. § 1341 (1976 & 1983 Supp.). Accordingly, the Court held that no federal statute sanctioned state court jurisdiction over the subject matter

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of the lawsuit. The court reasoned further that such jurisdiction would interfere with the powers of self-government conferred upon the tribe by certain federal statutes and agreements establishing the reservation and exercised through the Tribal Court, which was established pursuant to the tribe's 1935 constitution and bylaws.

The individual members of the tribe who initiated the subject adoption proceeding in the state court additionally argued that the ordinances of the tribe could not deprive the Montana courts of the jurisdiction they exercised over tribal matters prior to the organization of the tribe in 1935. The argument was rejected on the basis of federal preemption, standing alone. The Court held that even assuming that Montana courts had properly exercised jurisdiction prior to the organization of the tribe, such jurisdiction had been preempted as of 1934. The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. "Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians." 424 U.S. at 390, 96 S.Ct. at 948, 47 L.Ed. 2d at 113.

Admittedly, the *Fisher* Court placed great emphasis on the fact the Tribal Council of the Northern Cheyenne Tribe had established a Tribal Court and granted it jurisdiction over adoptions among members of the tribe. However, I do not agree with the majority that the lack of a similar Tribal Court on the Eastern Cherokee Reservation removes this case from the ambit of *Fisher* and *Kennerly* with regard to the preemptive effect of Public Law 280 and the requirement that affirmative political action be taken by the state legislature to acquire jurisdiction. There is no indication in the *Kennerly* discussion of Public Law 280 that the existence or non-existence of a Tribal Court was to be determinative of a state's need to comply with Section 7 in order to obtain effective jurisdiction over civil causes of action brought by or against Indians. The relevant question under Public Law 280 is whether Congress preempted the entire field of state court jurisdiction as of 1953, not whether any particular Indian tribe did or did not have a Tribal Court functioning at that time for civil dispute resolution. My research has disclosed no case in which a state has been held exempt from the preemptive sweep of Public Law 280, nor any intimation in any of the reported cases

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that such an exemption may be implied through judicial construction.⁵

The judicial reluctance to extend state jurisdiction over civil causes of action arising between Indians in Indian country undoubtedly stems from the recognition that Indian tribes have retained a semi-independent position as a separate people with the power of regulating their internal and social relations. *White Mountain, supra*. This "backdrop" of tribal sovereignty has clearly informed the federal preemption decisions on the question of state jurisdiction over reservation Indians.

The Indian preemption decisions are highly protective of tribal self-government in Indian country and allow minimal application of state law. The limited role of the states under the Supremacy Clause results from retained tribal sovereignty, from a comprehensive federal legislative scheme dating to the beginning of the nation, and from extensive federal administrative activity by the Bureau of Indian Affairs and other agencies. [Par.] *The single most important factor in state exclusion is tribal sovereignty under the protection of federal law.*

F. Cohen, *supra*, at 270. Moreover, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain, supra*, at 144, 100 S.Ct. at 2584, 65 L.Ed. 2d at 673. One area of extensive tribal power is

5. In only one recently decided case involving a contract action brought by an Indian tribe against a non-Indian for a claim arising on the tribe's reservation has the Supreme Court indicated that jurisdiction "lawfully assumed" by a state prior to 1953 was not divested by Public Law 280, nor was a disclaimer of such jurisdiction authorized by the statute; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, --- U.S. ---, 104 S.Ct. 2267, 81 L.Ed. 2d 113 (1984). Although the opinion contains many broad statements about the purpose and effect of Public Law 280 that appear, at first glance, to support the appellee's claim that North Carolina's jurisdiction was not preempted by the Act of 1953, a close reading of the text dispels this impression. The "lawfully assumed jurisdiction" referred to is *only* the state's jurisdiction to entertain a civil action by an Indian tribe against a non-Indian for a claim arising on an Indian reservation. It is not the state's *coercive* jurisdiction over claims by non-Indians against Indians or more importantly, over claims between Indians, and the Court was very careful to distinguish those situations from the situation in the *Wold* case itself. The Court acknowledged that the

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domestic relations among tribal members. F. Cohen, *supra*, at 249. See, e.g., *Fisher v. District Court, supra* (adoption proceedings); *United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1196 (1916) (adultery; relations of Indians among themselves is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise).

Indeed, it is a feature of the tribal-federal relationship that exclusive tribal judicial jurisdiction over internal reservation affairs is generally retained unless this power is removed by explicit legislation. F. Cohen, *supra*, at 250. The absence of a specific tribal mechanism for the enforcement of tribal rules or of court judgments does not affect a tribe's exclusive judicial jurisdiction. See *id.* at 250, n. 62, and cases cited therein. This is so because the right protected is the "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee, supra*, at 220, 79 S.Ct. at 271, 3 L.Ed. 2d at 254. Thus, the federally protected, retained tribal power to administer justice is not dependent on the establishment of a tribal court modelled on either the state or federal court system.

There is no indication in either *Fisher* and *Kennerly* that the Supreme Court limited its interpretation of the scope of Public Law 280 to only those states containing Indian reservations lacking tribal courts. See also *Washington v. Yakima Indian Nation, supra*. Furthermore, the Court has repeatedly recognized "[n]on-judicial tribal institutions . . . as competent law applying bodies." *Santa Clara Pueblo v. Martinez, supra*, at 66, 98 S.Ct. at 1681, 56

interests implicated where the tribe itself brings suit are "very different" from those implicated where a non-Indian sued an Indian as an action in which all parties were tribal Indians, comparing *McClanahan v. Arizona State Tax Comm'n, supra*, with *Williams v. Lee, supra* and *Fisher v. District Court, supra*. As the Court in *McClanahan* noted, the jurisdictional situation involving non-Indians is governed by different principles than the situation involving only tribal Indians because in the former, "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions." 411 U.S. at 179, 93 S.Ct. at 1266, 36 L.Ed. 2d at 140. In sharp contrast, the exercise of state court jurisdiction over claims between Indians for on-reservation conduct is acknowledged to "intrud[e] impermissibly on tribal self-governance." --- U.S. at ---, 104 S.Ct. at 2274, 81 L.Ed. 2d at 122. Accordingly, and for the reasons stated in Part I of this opinion, North Carolina's historical exercise of jurisdiction over civil actions between tribal Indians for on-reservation conduct cannot be considered "lawfully assumed jurisdiction" capable of surviving the enactment of Public Law 280.

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L.Ed. 2d at 120; see also *United States v. Mazurie*, *supra* (tribal councils constitute appropriate bodies in which Congress may vest a portion of its own authority under the Indian Commerce Clause).

As I understand the controlling cases involving conflicting claims of tribal-state jurisdiction, the Supreme Court has conclusively and without exception held that Public Law 280 bars *any* state civil jurisdiction over Indians for on-reservation conduct that is not assumed in conformity with this "governing Act of Congress" regarding state acquisitions of jurisdiction after 1953. This view is also held by a number of state courts which have denied state jurisdiction over reservation Indians on the ground that the state had not accepted Congress' invitation to take jurisdiction under Public Law 280. See, e.g., *Morgan v. Colorado River Indian Tribe*, 7 Ariz. App. 92, 436 P. 2d 484, *vacated on other grounds*, 103 Ariz. 425, 443 P. 2d 421 (1968) (civil jurisdiction over Indian tribe for alleged tort committed on reservation); *Francisco v. State*, 113 Ariz. 427, 556 P. 2d 1 (1976) (personal jurisdiction; paternity actions); *Martin v. Denver Juvenile Court*, 177 Colo. 261, 493 P. 2d 1093 (1972) (paternity actions); *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D.S.D. 1971) (civil jurisdiction to enforce judgment on reservation); *Blackwolf v. District Court*, 158 Mont. 523, 493 P. 2d 1293 (1972) (juvenile delinquency proceedings); *Crow Tribe v. Deernose*, 158 Mont. 25, 487 P. 2d 1133 (1971) (jurisdiction over real estate mortgage foreclosure action on Indian trust lands). See generally, F. Cohen, *supra*, at 362-368.

III

In conclusion, I cannot agree with the majority's holding that North Carolina's civil jurisdiction over the Eastern Band was not divested by the passage of Public Law 280. As the foregoing discussion demonstrates, the general rule is that federal protection of tribal self-government precludes either criminal or civil jurisdiction of state courts over Indians or their property absent the consent of Congress. Although the members of the Eastern Band of Cherokees are citizens of North Carolina, they are, nevertheless, a federally recognized Indian tribe, living on an Indian reservation held in trust by the United States for their benefit. The preeminent federal supervisory authority over the Eastern

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Band was neither terminated nor diminished by the Treaty of New Echota. Jurisdictional controversies between the states and Indian tribes having a "dual status" deriving from early treaties of removal, such as the Eastern Band, are to be resolved by looking at the current status of the Indians under federal law; such treaty rights or provisions did not immutably fix the relation between the state of North Carolina and the Eastern Band. Under federal Indian law, the legal status of the members of the Eastern Band did not differ materially from that of other Indian tribes at the time Public Law 280 was enacted.

In my opinion, the language, legislative history and controlling decisions of the United States Supreme Court interpreting Public Law 280 establish that the statute is *the* governing act of Congress regarding state judicial jurisdiction over civil causes of action brought by or against Indians arising in Indian country. It is a preemptive act of general applicability; by its express terms, Public Law 280 had the effect of abrogating all prior inconsistent treaty provisions governing jurisdictional matters. To date, no state has been judicially found to be exempt from the preemptive sweep of Public Law 280. The legislative history of the Act with regard to North Carolina is at best inconclusive and fails to indicate any congressional intent to exempt North Carolina from compliance with the procedures established therein to acquire effective jurisdiction over the Eastern Band of Cherokees.

Therefore, prior to 1968, North Carolina could only have obtained such jurisdiction by affirmative legislative action. Strict compliance with Public Law 280's requirement that the people of each state make this choice *politically*, either through amendatory action, where required, or by affirmative legislative action, has been mandated by the Supreme Court in its interpretations of this federal statute. Consequently, Public Law 280 has consistently been construed to bar any state jurisdiction that is not assumed in conformity with its provisions.

From a practical standpoint, the majority's conclusion that Public Law 280 was not meant to cut off state jurisdiction over civil suits between reservation Indians who had no tribal court system is unarguably reasonable. However, the Act itself contains no express exemption for North Carolina on this basis and, again, the legislative history with regard to the jurisdictional situation

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in North Carolina is too speculative a basis upon which to judicially recognize an implied exemption. The federally protected power of the Indian tribes to administer justice over the domestic relations among tribal members living on the reservation is simply not dependent on the establishment of a tribal court system. Accordingly, I find no basis upon which North Carolina's jurisdictional claims over reservation Indians may be distinguished in principle from those of any other state. The laudatory concern underlying the majority's opinion, that some thirty years of state court judgments involving Indians not be rendered nugatory, may be best addressed by the state legislature, with the consent of Congress, in the form of a curative statute. I, however, am unable to reach this result by judicial construction. Therefore, I must respectfully concur only in the result reached today on the ground that the trial court lacked jurisdiction over the subject matter of this lawsuit.

STATE OF NORTH CAROLINA v. CAREY PRESTON ROZIER AND HAROLD
DEAN CARTER

No. 8316SC528

(Filed 19 June 1984)

1. Narcotics § 2— indictment charging sale or delivery—no fatal defect

Indictments charging the sale or delivery of cocaine were not fatally defective because of the use of the disjunctive.

2. Narcotics § 2— failure of indictment to specify form of trafficking—no fatal defect

An indictment charging conspiracy to traffic in cocaine was not fatally defective because it failed to specify which form of trafficking defendant conspired to commit, and defendant's failure to request a bill of particulars precluded defendant from raising the issue on appeal.

3. Narcotics § 4.3— possession of cocaine—sufficiency of evidence

The State's evidence was sufficient to support one defendant's convictions of possession of cocaine with intent to sell or deliver on two separate dates where it tended to show that defendant admitted that the trailer where the cocaine sales occurred was his and that he was there when the State's evidence showed that the transactions occurred, that defendant had used and distributed cocaine in the past, and that defendant knew of the transactions in question through telephone and personal conversations with an accomplice. The State's evidence was also sufficient to support conviction of a second de-

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fendant on the same charges where there was eyewitness testimony that he personally handed cocaine to the accomplice on one date and that he directed another person to turn over the cocaine to the accomplice on a second date.

4. Narcotics § 1.3— conspiracy to traffic in cocaine—amount of contraband agreed upon

The amount of contraband agreed upon, not the amount actually delivered, is determinative in a narcotics conspiracy case. Therefore, defendant could be convicted of conspiracy to traffic in cocaine where the evidence showed an agreement to sell more than 28 grams although less than 28 grams was actually delivered. G.S. 90-95(h)(3), (i).

5. Narcotics § 4— conspiracy to traffic in cocaine—sufficiency of evidence

The State's evidence was sufficient to support conviction of one defendant of conspiracy to traffic in cocaine where it tended to show a conversation between defendant and an accomplice during which the sale of one ounce of cocaine was agreed upon. The State's evidence was sufficient to support conviction of a second defendant on the same charge where it tended to show that both defendants were regular companions and both had access to narcotics; the second defendant relayed messages concerning the cocaine transactions to the first defendant and twice accompanied the first defendant to the meeting place; and the second defendant was physically present when the cocaine was exchanged for cash in his home.

6. Narcotics § 4.2— sale to undercover agent through accomplice—knowledge by defendants

The State's evidence was sufficient to support a finding that both defendants knew that a sale of cocaine was being made through an accomplice to the undercover agent named in the indictment where it tended to show that the accomplice informed the first defendant during the negotiations that she was buying for another person and that the person named in the indictment was such other person, and where the evidence also tended to show that the second defendant accompanied the first defendant to a meeting with the accomplice and the undercover agent, rode with the first defendant and the accomplice to and from a place where the sale occurred, and was present when the first defendant told the accomplice that the deal would be cancelled if the person for whom she was buying the cocaine didn't like it.

7. Conspiracy § 6; Narcotics § 4— two sales of narcotics—conviction of only single conspiracy

The State's evidence showed only a single conspiracy to supply cocaine, and defendants could not be convicted of two separate conspiracies involving sales of cocaine on 9 June and 15 June 1982, where an undercover agent originally requested through an accomplice to purchase four ounces of cocaine from defendants; one defendant advised the accomplice that the first sale would only be one ounce, and such sale occurred on 9 June; when the cocaine turned up short, the accomplice told the agent that the difference would be made up the next time; several days later one defendant advised the accomplice that he was ready to go ahead with the four ounces; and such sale occurred on 15 June.

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8. Narcotics § 4— possession of cocaine sold to officer—possession of cocaine in vials—separate convictions

Defendants could properly be convicted of both felonious possession of cocaine sold to an undercover agent and misdemeanor possession of small amounts of cocaine found shortly thereafter in vials for personal use where the transfer of the large amount of cocaine to the undercover agent was entirely completed when the vials with cocaine residue were found.

9. Criminal Law § 34.6— evidence of other crimes—competency to show guilty knowledge

Evidence of defendants' prior distribution of illicit drugs was competent in a prosecution for various narcotics charges to show guilty knowledge.

10. Criminal Law § 92.1— consolidation of charges against two defendants

The trial court did not err in consolidating for trial various narcotics charges against two defendants where the charges arose from the same criminal activity, neither defendant offered a defense antagonistic to the other, and no specific evidence was pointed out that was improperly included or excluded as a result of consolidation.

11. Criminal Law § 92.5— refusal to sever charges against two defendants

The trial court did not abuse its discretion in refusing to sever narcotics charges against two defendants, although there were numerous charges in the case, where the transactions on which they were based were fairly simple and involved a limited number of persons and a limited period of time. G.S. 15A-927(b)(2).

12. Criminal Law § 102.6— improper jury argument—error cured by instructions

Any impropriety in the prosecutor's jury argument characterizing a question posed by defense counsel as "slick" was cured when the trial court sustained defendants' objection thereto and instructed the jury to disregard such comment.

13. Criminal Law § 102.9— jury arguments characterizing defendants as "the devil"

The prosecutor's jury argument that "I've heard it said that if you want to try the devil you have to go to hell to get your witnesses" did not constitute reversible error when considered in context.

14. Criminal Law § 102.6— narcotics case—jury argument concerning curiosity of children

In a prosecution upon various narcotics charges, the trial court did not abuse its discretion in overruling defendants' objection to the prosecutor's jury argument that children are naturally curious and that in the drug world, there are those who would play upon that natural curiosity.

15. Criminal Law § 102.12— improper jury argument—error cured by curative instructions

In a prosecution upon various narcotics charges, the trial court's curative instructions rendered harmless any impropriety in the prosecutor's jury argument in which he stated that "there's maybe a higher law" than the court's,

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read a verse from the Bible stating, "If any man defile the temple of God, him shall God destroy," and noted that there was no death penalty in the case but that the jury could insure that defendants would be out of the drug business for a long time.

16. Criminal Law § 117.4— instruction on accomplice's testimony given in substance

The trial court in substance gave defendants' requested instruction on accomplice testimony where the court instructed the jury that the accomplice was charged with the same criminal offenses as defendants, had entered pleas of guilty, and was considered by the law to have an interest in the outcome of the trial, and where the court then gave the appropriate instruction on the scrutiny to be given the testimony of interested witnesses.

17. Criminal Law § 138— sentencing—aggravating and mitigating factors—failure to make findings as to each offense—harmless error

The trial court erred in failing to make separate findings as to aggravating and mitigating factors for each offense, but such error was not prejudicial where the court could have imposed sentences totaling thirteen years for the offenses in question without finding any aggravating factors but imposed a consolidated sentence of only ten years.

18. Criminal Law § 138— mitigating factor—only passive participant—insufficient evidence

The trial court did not err in failing to find as a mitigating factor that one defendant was only a passive participant in various narcotics offenses where there was evidence that such defendant knowingly served as the second defendant's messenger in narcotics transactions, that such defendant allowed his house to be used and was present at narcotics transactions, and that such defendant was ready to join in armed pursuit of an undercover agent who left with narcotics without paying for them.

APPEAL by defendants from *Martin, John C., Judge*. Judgments entered 5 November 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 December 1983.

Defendants were tried jointly and convicted on numerous drug and concealed weapon charges. The charges arose from two separate transactions with undercover police officers.

The State's evidence, relying heavily on an accomplice's testimony, tended to show the following: Police obtained the name of the accomplice, who worked at a nightclub in Fayetteville, from a confidential informant. An officer approached her posing as a person interested in purchasing large amounts of cocaine. The accomplice agreed to help arrange a transaction for the purchase of four ounces of cocaine. The accomplice testified that

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defendants had frequently visited her at her places of employment, and had shared their cocaine and other drugs with her. She testified that she contacted defendant Carter, asking him to contact defendant Rozier. At a meeting Rozier advised the accomplice that the first sale would be only one ounce. Price and other details were worked out by phone with Carter and the accomplice as go-betweens. On 9 June 1982, the undercover agent drove with the accomplice to a location near Lumberton. Both defendants drove up in Rozier's truck, picked up the accomplice, and drove to Carter's trailer in rural Robeson County. There the money and cocaine were exchanged, and the accomplice was brought back to the meeting place. The agent expressed his satisfaction with the drugs; they actually weighed 27.71 grams.

Shortly thereafter, similar arrangements were made for the purchase of four ounces of cocaine. Again, price and meeting place were negotiated with defendant Carter and the accomplice as go-betweens. Because of the large amounts of money and drugs involved, the agent demanded that he be allowed to go to the scene of the transaction. Defendants agreed that he could come to the trailer but would remain in his car. At the last minute defendants offered to sell five instead of four ounces of cocaine, and the agent agreed. On 15 June 1982, the agent and the accomplice drove to Carter's trailer; state and local officers had been alerted to move in as soon as the deal was complete. The accomplice went inside while the agent waited. She testified that only Carter was present, but he said that Rozier was to arrive shortly. The accomplice went back out to the car to tell the agent of the delay, then returned to the trailer. Rozier and a third person, Kinlaw, arrived soon afterwards. Rozier instructed the accomplice to go into a bedroom with Kinlaw, where Kinlaw gave her a bag containing about five ounces of a mixture containing about 30% cocaine. The accomplice came out of the bedroom and told Rozier that her buyer would have to check the drugs before he gave defendants the money, and then went out to the car. The accomplice got in, and the agent started the car and drove off at high speed. Defendants Rozier and Carter ran out and started after the agent in their truck; as they reached the road the waiting officers converged and arrested them. A search incident to the arrest revealed the following: a .25 caliber automatic pistol and a vial containing cocaine residue on defendant Carter's per-

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son; and two vials, one of which contained cocaine residue, and a .32 caliber pistol in the console and glove compartment of the truck. Two bags of marijuana and various drug paraphernalia were found in a consent search of the trailer. Kinlaw was arrested in the trailer; his trial was severed from defendants'. The accomplice was also arrested; she entered pleas of guilty to the various charges against her.

Defendants' evidence tended to show that they had no knowledge of the cocaine transactions. Both admitted that they used cocaine, but that they did not sell it. Their evidence showed that the accomplice dealt only with one Don Autry, a friend of theirs with whom she was having an affair. Defendants had picked up the accomplice on several occasions and brought her to motels where Autry was staying. Defendants allowed Autry to use their phones, and Carter relayed messages from the accomplice to Autry, not Rozier. On both occasions when the alleged cocaine transactions took place, the accomplice went into a bedroom alone with Autry. Neither defendant saw any cocaine or money change hands. When the accomplice went out with the drugs on 15 June, Autry yelled that the law was outside and ran out the door and into the woods. Defendants Rozier and Carter were leaving to escape arrest for possession of the small amounts of cocaine in the vials when arrested.

The State vigorously contested Autry's role and his very existence. Defendants presented testimony from other witnesses who had seen Autry, but no direct evidence of his presence or existence. They also presented evidence that the accomplice continued to be involved with cocaine traffic and prostitution.

The jury found defendants guilty on all charges as follows (with the date of the offense in parentheses):

Defendant Rozier

Case 82CRS9742—felonious conspiracy to traffic in cocaine (9 June 1982);

Case 82CRS9744—Count 1, felonious possession of cocaine with intent to sell or deliver, and Count 2, felonious sale or delivery of cocaine (9 June 1982);

Case 82CRS9743—felonious conspiracy to traffic in cocaine (15 June 1982);

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Case 82CRS9740—felonious trafficking in cocaine (15 June 1982);

Case 82CRS9741—misdemeanor possession of cocaine (15 June 1982); and

Case 82CRS9911—misdemeanor carrying of a concealed weapon (15 June 1982).

Defendant Carter

Case 82CRS9747—felonious conspiracy to traffic in cocaine (9 June 1982);

Case 82CRS9745—Count 1, felonious possession of cocaine with intent to sell or deliver, and Count 2, felonious sale or delivery of cocaine (9 June 1982);

Case 82CRS9749—felonious conspiracy to traffic in cocaine (15 June 1982);

Case 82CRS9748—felonious trafficking in cocaine (15 June 1982);

Case 82CRS9750—misdemeanor possession of cocaine (15 June 1982);

Case 82CRS9746—misdemeanor possession of marijuana (15 June 1982); and

Case 82CRS9926—misdemeanor carrying of a concealed weapon (15 June 1982).

Both defendants were sentenced to terms in excess of the presumptive and fined. Both appeal.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant Carter.

Regan and Regan, by John C. B. Regan III, for defendant appellant Rozier.

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JOHNSON, Judge.

Defendant Rozier has adopted the brief of defendant Carter. Therefore, the two defendants' appeals are treated herein as one, except where defendant Carter has raised questions pertinent only to his own appeal.

I

Certain of the indictments charged sale *or* delivery of cocaine, and conspiracy to sell *or* deliver. The conspiracy indictment against defendant Carter arising out of the 15 June 1982 transactions charged only "trafficking," without specifying which specific form of trafficking Carter conspired to commit. These deficiencies, contend defendants, rendered the indictments fatally defective and therefore the court erred in denying their motions to quash.

A

[1] G.S. 90-95(a)(1) provides that it is unlawful for any person "To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance," including cocaine. Sale and delivery are separate offenses. *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). Ordinarily, an indictment which charges separate offenses in the alternative is defective and defendants may properly move to quash or compel the State to make an election. Defendants moved to quash because of the above duplicity and their motions were denied.

The rule against disjunctive pleading is not absolute, however. *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955), provides an apt example. There, defendant challenged an indictment as duplicitous which alleged that he "did unlawfully and wilfully build *or* install a septic tank" (emphasis supplied) without first obtaining a permit. The Court held that the terms "build" and "install" were synonymous and the disjunctive pleading was therefore irrelevant. Even if the words were not synonymous, held the Court, the gist of the offense lay not in the manner in which the tank reached completion, but in defendant's failure to obtain a permit, and therefore no prejudice could result. *Id.* at 565, 89 S.E. 2d at 131. Here, the only difference between "sell" and "deliver" is the fact that money changes hands in a sale. The gist of both offenses, the act which the General Assembly intend-

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ed to punish, is the transfer of controlled substances. The statutes define trafficking offenses in terms of the amount of illicit drugs involved, not the amount of money. Defendants were clearly on notice which transfers were the subject of the indictments.

[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

State v. Sturdivant, 304 N.C. 293, 311, 283 S.E. 2d 719, 731 (1981). Therefore, we hold that the indictments charging "sale or delivery" were not fatally defective and that the court did not abuse its discretion in denying defendants' motions to quash. *Id.*; *State v. Jones*, *supra*.

B

[2] The conspiracy to traffic indictment against Carter based on the transaction of 15 June 1982, case number 82CRS9749, presents a similar question. The indictment, tracking the statute, charged the single felony of trafficking. See G.S. 90-95(h)(3). However, trafficking may be committed in various ways; one who "sells, manufactures, delivers, transports, or possesses" more than the statutory minimum has committed the offense. *Id.* These are separate offenses. *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *disc. review denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982). The failure to specify which denounced act was conspired to renders the indictment fatally defective, argues Carter.

Before trial Rozier moved to quash the parallel indictment against him, which charged a conspiracy to sell or deliver. The motion was grounded on the alleged duplicity; Carter joined in the motion, even though the indictment against him did not include the language complained of. He did not raise the omission orally. It is well established that failure to move to quash waives the defect in the indictment. See *e.g. State v. Turner*, 8 N.C. App. 541, 174 S.E. 2d 863 (1970). By failing to move to quash for the alleged omission defendant Carter waived the defect; moreover, by joining in defendant Rozier's motion he admitted that he in fact had notice of the nature of the charge against him.

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The Supreme Court has routinely held that indictments simply charging murder with malice aforethought suffice to support felony-murder convictions, and that defendants desiring more information must exercise their right to request a bill of particulars. See G.S. 15A-925; *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Mays*, 225 N.C. 486, 35 S.E. 2d 494 (1945). This Court has held that a defendant charged with failing to disperse could not complain of the failure of the charging document to disclose the underlying disorderly conduct where no bill was requested. *State v. Clark*, 22 N.C. App. 81, 206 S.E. 2d 252, *appeal dismissed*, 285 N.C. 760, 208 S.E. 2d 380 (1974), *cert. denied*, 420 U.S. 977, 43 L.Ed. 2d 658, 95 S.Ct. 1403 (1975). Assuming *arguendo* that Carter had not otherwise waived the defect, his failure to request a bill of particulars to an indictment which clearly informed him of the felony charged precludes him from raising the omission here. *Id.*; *State v. Swift*, *supra*; see generally 41 Am. Jur. 2d, Indictments and Informations § 303 (1968). This assignment is overruled.

II

Defendants, particularly Carter, contend that the evidence against them did not suffice to go to the jury on the felony charges. It is elementary that there must be substantial evidence of all material elements of the offenses charged for the case to reach the jury. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982). In applying this test,

[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intentment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court. . . .

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). "In addition to producing substantial evidence of each of the material elements of the particular offense, the State must produce substantial evidence that the defendant committed it." *State v. LeDuc*, *supra* at 75, 291 S.E. 2d at 615. If the evidence suffices only to raise a suspicion or conjecture that defendant committed the offense, it is insufficient. *Id.*

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A

[3] Defendant Carter contends that the evidence did not suffice to support his convictions of possession of cocaine with intent to sell or deliver on either 9 June or 15 June 1982. Carter admitted that the trailer where the deals took place was his and admitted that he was there when the State's evidence showed the transactions to have occurred. The State presented evidence that Carter had used and distributed cocaine in the past and knew of the subject transactions, by telephone conversations and conversation with the accomplice in person. In *State v. Tate and State v. Tate*, 58 N.C. App. 494, 294 S.E. 2d 16 (1982), *aff'd*, 307 N.C. 464, 298 S.E. 2d 386 (1983) (per curiam), this Court ruled that similar evidence sufficed to support a possession conviction. There, narcotics were found in an apartment rented by defendant and apparently used by his sister in her dealing operations. Following *Tate*, there was sufficient evidence here for the jury to conclude that Carter at least constructively possessed the cocaine involved. See also *United States v. DeLeon*, 641 F. 2d 330 (5th Cir. 1981) (various otherwise inconclusive circumstances combined to permit inference of possession); *Cleveland v. State*, 155 Ga. App. 267, 270 S.E. 2d 687 (1980) (husband constructively possessed drugs found with wife, owner of house, and another in closed room). Compare *United States v. Williams*, 569 F. 2d 823 (5th Cir. 1978) (owner not criminally liable for allowing others to use his property when he does not know of their criminal purpose).

Defendant Rozier was also convicted of two charges of possession. There was eyewitness testimony (1) that he personally handed the cocaine to the accomplice on 9 June 1982 and (2) that he directed Kinlaw to turn over the cocaine to the accomplice on 15 June 1982. This sufficed to take these cases to the jury. *State v. Lofton*, 42 N.C. App. 168, 256 S.E. 2d 272 (1979).

B

[4] The amount of cocaine which actually changed hands on 9 June 1982 was 27.71 grams, although the amount agreed on was an ounce (an ounce equals 28.349 grams). The minimum amount which will support a trafficking conviction is 28 grams. G.S. 90-95(h)(3). Therefore, argue defendants, the evidence did not support their convictions for trafficking on 9 June 1982; they contend

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that the State improperly used the conspiracy indictment for a chance at the mandatory seven-year sentence for trafficking.

A criminal conspiracy is an agreement by two or more persons to perform an unlawful act or to perform a lawful act in an unlawful manner. *State v. Hammette*, 58 N.C. App. 587, 293 S.E. 2d 824 (1982). It is a separate crime from the underlying substantive offense. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). The crime is complete once the agreement has been reached; no overt act is necessary to establish criminal liability. *State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983). Once a criminal conspiracy has been proven, punishment is according to the law governing the conspiracy, not the substantive offense. *State v. Puryear*, 30 N.C. App. 719, 228 S.E. 2d 536, *disc. review denied and appeal dismissed*, 291 N.C. 325, 230 S.E. 2d 678 (1976). The penalty for conspiracy to traffic in controlled substances is the same as for the substantive offense of trafficking. G.S. 90-95(i). Applying the foregoing principles, we hold that it is the amount of contraband agreed upon, not the amount actually delivered, which is determinative in a narcotics conspiracy case. Defendants apparently contend that since "there is no honor among thieves," they should only be punished for what they actually delivered, not their criminal agreement. The legislative recognition of the crime of conspiracy to traffic implicit in G.S. 90-95(i), and the General Assembly's insistence on enhanced punishment for that crime, belie this argument. If the evidence showed an *agreement* to deliver more than the statutory minimum, that agreement will control.

[5] As to defendant Rozier, the evidence clearly sufficed to prove a conspiracy to traffic in cocaine on or about 9 June 1982. The State's evidence showed a series of conversations between Rozier and the accomplice during which the sale of the one ounce amount, sufficient to support the conviction, was agreed upon. That alone sufficed to reach the jury.

As to defendant Carter, the evidence was not as strong but still sufficient. Circumstantial evidence may be used to show a conspiracy. *State v. LeDuc*, *supra*. Conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." 306

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N.C. at 76, 291 S.E. 2d at 616, *quoting State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). It is not necessary that the individual charged expressly state his willingness to participate; a mutual, implied understanding is sufficient. *Id.* The State presented evidence that Carter and Rozier were regular companions and that both had access to narcotics, that Carter relayed messages concerning the subject cocaine transactions to Rozier, that Carter twice accompanied Rozier to the meeting place on 9 June 1982, and that Carter was physically present when the cocaine was exchanged for cash in his home. This sufficed to allow the question of his participation in a drug conspiracy to go to the jury. The State established *prima facie* Rozier's and Carter's involvement in the conspiracy, and therefore Rozier's statements regarding the amount of narcotics became admissible against Carter as evidence of conspiracy to traffic. *State v. Small, supra.* The conviction of defendant Carter for conspiracy to traffic involving the 9 June 1982 transaction is thus supported by sufficient evidence.

C

[6] Defendants challenge the sufficiency of the evidence to prove sale and delivery on 9 June 1982 to the undercover agent named in the indictment. As to Rozier, this contention is totally without merit, since there is ample evidence that the accomplice informed him that she was buying for another person during the course of the negotiations, and that the person named in the indictment was that other person. As to Carter, the evidence again is not quite as strong. He contends that the accomplice was the only person to whom the evidence showed he knew cocaine was sold, and that this fact created a fatal variance between the indictment and the proof, relying on *State v. Sealey*, 41 N.C. App. 175, 254 S.E. 2d 238 (1979). No evidence that Carter was directly informed of the accomplice's agency appears in the record.

Knowledge may be proven by circumstantial evidence, however. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977) is directly on point: there it was held that defendant's presence at the robbery and his earlier presence in a car where co-defendants discussed the crime were competent to prove knowledge of the criminal plan. Here, there was eyewitness testimony by the agent that defendant Carter accompanied defendant Rozier and the ac-

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complice both from the meeting place and back to it after the exchange had taken place on 9 June 1982. The three sat in close proximity in the front seat of a pickup truck. There was also evidence that Rozier told the accomplice before she got out that she should have her contact "look at it and if who I [the accomplice] was buying for didn't like the coke to stay there" and the deal could be cancelled. There was plenary evidence that the person named in the indictment was the agent waiting at the meeting place. This evidence sufficed to go to the jury on the issue of Carter's knowledge. *State v. Foster, supra.*

D

As a final catch-all, Carter challenges the sufficiency of the State's evidence generally. He argues that the State showed only his presence at the scene of these crimes, and that a "shadow" does not a criminal accomplice make. The State's case against Carter was largely circumstantial. It is no longer necessary, however, that circumstantial evidence exclude every reasonable hypothesis of innocence to withstand a motion to dismiss. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). The evidence must give rise to a reasonable inference of guilt; then it is for the jury to decide whether that evidence satisfies them beyond a reasonable doubt of defendant's guilt. *Id.*

It is true that mere presence at the scene of the crime does not make a defendant a principal thereto, even though he makes no effort to stop the crime or secretly approves or intends to encourage it. *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). Such is not the case here. The State presented evidence that Carter had an established relationship with Rozier, that both had had access to and distributed narcotics, that Carter knowingly served as a messenger in the purchase negotiations, that he allowed his home to be used as the place of business, that he twice accompanied defendant Rozier to the meeting place on 9 June 1982 with knowledge of the purpose of the meeting, that he joined defendant Rozier in armed pursuit of the agent and the accomplice on 15 June 1982, and that he was present during both transfers. This evidence clearly goes beyond *Bruton, supra*, and sufficed to go to the jury on all issues. See *State v. Beasley*, 3 N.C. App. 323, 164 S.E. 2d 742 (1968) (standing by to render aid and preventing aid to victim sufficient). We conclude that defend-

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ants' motions to dismiss for insufficient evidence were properly denied.

III

[7] Defendants contend that they could not be convicted of two separate conspiracies, one involving the transactions of 9 June 1982 and the other the transaction of 15 June 1982. They argue that there was at most a single conspiracy directed toward a single continuous result, i.e., the fulfillment of the original request for four ounces of cocaine. The State contends that the criminal purpose of the first agreement was completed and that thereafter, when the agent renewed contact, a new criminal agreement involving further negotiations had to be worked out.

It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime. See e.g. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978); see also *Braverman v. United States*, 317 U.S. 49, 87 L.Ed. 23, 63 S.Ct. 99 (1942). It is also clear that where a series of agreements or acts constitutes a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy. *United States v. Kissel*, 218 U.S. 601, 54 L.Ed. 1168, 31 S.Ct. 124 (1910). Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts. This Court has affirmed multiple conspiracy convictions arising from multiple substantive narcotics offenses involving a single amount of drugs found on a single occasion, *State v. Sanderson*, 60 N.C. App. 604, 300 S.E. 2d 9, *disc. review denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983), apparently on the theory that each conspiracy involved separate elements of proof, and represented a separate agreement. However, under North Carolina law multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies. *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963), *appeal dismissed*, 375 U.S. 9, 84 S.Ct. 72, 11 L.Ed. 2d 40 (1963) (per curiam). There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, *Braverman v. United States*, *supra*, but factors such as time intervals, participants, objectives, and number of meetings all must be considered.

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It is only proper that the State, having elected to charge separate conspiracies, must prove not only the existence of at least two agreements but also that they were separate. *See Commonwealth v. Cervený*, 387 Mass. 280, 439 N.E. 2d 754 (1982). The State contends that the evidence showed that the original agreement ended with the completed sale of 9 June 1982, and thereafter a new agreement had to be worked out, culminating in a new confederation and the second sale on 15 June 1982.

However, the State's own witnesses testified that the original request was for the larger amount of cocaine. The accomplice met with Rozier who told her that "the first time he would only sell [her] one ounce instead of four." When the cocaine turned up short on 9 June 1982, the accomplice (a co-conspirator) told the agent the difference would be made up next time. Rozier returned from a trip several days later and called the accomplice and told her he was ready to go ahead with the four ounces. The agent himself testified that he originally asked for four ounces. He maintained daily contact with the accomplice. Only six days separated the two transactions, which involved virtually the same parties. It is clear that this evidence showed only a single conspiracy to supply cocaine to the agent, and that the State has failed to show multiple conspiracies.

The decisions of other jurisdictions support this conclusion. In *Commonwealth v. Cervený*, *supra*, the same group of defendants submitted falsified forms in consecutive years to a state agency. The court held that the identity of the parties, objectives and means refuted the Commonwealth's contention that multiple forms submitted in individual years (over 4 or 5 day periods) supported multiple conspiracy convictions, but that the significant time intervals permitted the conclusion that separate conspiracy convictions were supported by each year's separate filings. In a case remarkably similar to the one at bar, *People v. Nunez*, 90 Misc. 2d 630, 395 N.Y.S. 2d 360 (1977), defendants arranged two transactions to sell cocaine to undercover police over an eight-day period, the first a "test" sale of one-eighth kilogram, followed by a full kilogram. The court held that defendants could not be convicted of two conspiracies, since the original agreement established the buyer-seller relationship which was the single intent of the conspiracy.

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Ordinarily, the existence of a conspiracy is a question for the jury. *State v. Conrad*, 4 N.C. App. 50, 165 S.E. 2d 771, *affirmed in relevant part*, 275 N.C. 342, 168 S.E. 2d 39 (1969). It follows then, that whether multiple agreements constitute a single conspiracy or multiple conspiracies is also a question of fact for the jury. Here, however, the State obtained separate conspiracy indictments and the court instructed accordingly. The jury was not presented with the choice of finding a single conspiracy. It did, however, find defendants guilty on both conspiracy counts, which is tantamount in this case to finding them guilty of the single larger conspiracy presented by the evidence. Since the conspiracy began on or about 9 June 1982, the earlier of the conspiracy convictions should stand, and the convictions for conspiracy based on the transactions of 15 June 1982, cases 82CRS9743 (Rozier) and 82CRS9749 (Carter), must be vacated. However, because the cases were consolidated for judgment with the substantive trafficking cases based on the 15 June 1982 transactions, defendants' sentences are not affected.

IV

[8] Both defendants were convicted not only of felonious possession of the cocaine sold to police on 15 June 1982, but also of misdemeanor possession of small amounts of cocaine. These were found during the search indictment to arrest on 15 June 1982; one vial containing cocaine residue was found on Carter's person and another in Rozier's truck. Defendants contend that these misdemeanor convictions violate their rights not to be subjected to double jeopardy, since misdemeanor possession is a lesser included offense of felonious possession, and possession of the two differing amounts of cocaine constituted a single continuing offense.

No North Carolina case has directly addressed this problem. In *State v. Shaw*, 28 N.C. App. 207, 220 S.E. 2d 634 (1975), this Court upheld separate convictions for possession of separate amounts of LSD on consecutive days where the evidence showed that the contraband was located in the same room, although police did not enter the room until the second day. Other jurisdictions which have considered the question appear to have adopted the rule that the possession offenses must be separate in time and space to warrant separate convictions. See *Powell v. State*, 502 S.W. 2d 705 (Tex. Crim. App. 1973); *People v. Shea*, 111 Cal.

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App. 3d 920, 169 Cal. Rptr. 24 (1980). Whether particular circumstances of possession constitute a single criminal act or several is a determination of a factual nature to be made by the trial court. See *State v. Kemp*, 305 N.W. 2d 322 (Minn. 1981); *Commonwealth v. Sabathne*, 227 Pa. Super. 331, 323 A. 2d 337 (1974). North Carolina effectively follows the same rule by investing the trial court with discretion to quash duplicitous indictments. See *State v. Hopkins*, 5 N.C. App. 282, 168 S.E. 2d 64 (1969). The question of whether these facts justified separate indictments was, therefore, addressed to the discretion of the court on defendants' motions to quash made at the beginning of trial.

The circumstances of each case will determine whether separate offenses may properly be charged. Obviously, if all the cocaine had been found on defendants' persons at the same time, only one offense could be charged. See *People v. Shea*, *supra* (three "ballons" of heroin on defendant's person could not support three convictions). On the other hand, the time/space differential between offenses need not be large. See *Gibson v. State*, 315 So. 2d 523 (Fla. App. 1975) (sales of LSD five minutes apart supported separate convictions); *United States v. Privett*, 443 F. 2d 528 (9th Cir. 1971) (three packages of heroin of different purity found on person and at two different places in car supported three convictions). Here, the evidence showed that defendants had sold a large amount of cocaine, and shortly thereafter were found with traces of cocaine in vials for personal use. There was no evidence that defendants had filled their vials out of the larger amount, nor that they had done so and then used the cocaine. There was no evidence that defendants intended to sell the residual cocaine. The transfer of the large amount of cocaine was entirely complete when the subject vials were found. Under these circumstances, we hold that the trial court did not err in denying defendants' motions to quash and that they could properly be convicted of both offenses.

Defendants contend that since the indictments simply alleged possession of cocaine on 15 June 1982, insufficient notice was given. However, one indictment alleged felonious trafficking by possession, while the other merely alleged misdemeanor possession. On the facts of the case this provided sufficient notice. Defendants' argument on their motions to quash clearly indicated that they knew which possession was charged in each indictment.

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They did not move for a bill of particulars. We hold that no prejudice resulted from the drawing of indictment charging possession on 15 June 1982. *State v. Sturdivant, supra.*

V

[9] The accomplice testified that defendants came to her place of employment repeatedly during the seven months prior to June 1982 and shared cocaine and other drugs with her and others. Defendants contend that this constituted inadmissible evidence of other crimes. Evidence of other drug violations is not admissible if its only relevance is to show disposition to deal in illicit drugs. *State v. Willis*, 309 N.C. 451, 306 S.E. 2d 779 (1983). However, such evidence is properly admissible to show specific mental intent or state or to show guilty knowledge. *Id.* Here, defendants both denied any knowledge of drug dealing and maintained that a third person, Autry, was the party responsible for the sales. Thus, evidence of their prior distribution of illicit drugs was competent to show guilty knowledge. The court properly admitted it and specifically instructed the jury that they were to consider such evidence only for that limited purpose. This assignment is, therefore, without merit.

VI

[10] The court, on motion by the State, ordered the cases against the defendants consolidated and later denied their motions to sever made at the close of the State's evidence. Defendants assign error to these rulings. Defendants were indicted from multiple identical felonies arising from the same criminal activity.¹ Therefore, consolidation was appropriate. *State v. Autry*, 27 N.C. App. 639, 219 S.E. 2d 795 (1975). Neither defendant offered a defense antagonistic to the other: both claimed ignorance of the cocaine dealings of a third party. No specific evidence is pointed out that was improperly included or excluded as a result of consolidation. The principal dangers of improper consolidation thus did not materialize. See *State v. Foster*, 33 N.C. App. 145, 234 S.E. 2d 443, *cert. denied*, 293 N.C. 255, 237 S.E. 2d

1. The misdemeanor cocaine possession and concealed weapons charges are identical, but involve different criminal activity. Similarly, defendant Carter alone was indicted for marijuana possession. These misdemeanors played only a minor role in the trial, however, and no prejudice is alleged or apparent as a result of including these charges.

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537 (1977). Defendants had ample opportunity to confront the witnesses against them, including each other. The court did not abuse its discretion in ordering consolidation.

[11] G.S. 15A-927(b)(2) requires the court to consider, upon a motion for severance made during trial, "whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." Although there were numerous charges in the case, the transactions on which they were based were fairly simple, involving a limited number of persons and a limited period of time. Several offenses charged were possession offenses not seriously disputed by defendants. Therefore, the court could properly conclude that the jury would not be confused and did not abuse its discretion in denying severance. *See State v. Overton*, 60 N.C. App. 1, 298 S.E. 2d 695 (1982), *disc. review denied and appeal dismissed*, 307 N.C. 580, 299 S.E. 2d 652; *State v. Ruviwat*, 307 N.C. 581, 299 S.E. 2d 652 and *State v. Smedley*, 307 N.C. 581, 299 S.E. 2d 653 (1983) (severance properly denied despite sixteen indictments involving at least fourteen conspirators in fifteen-year international conspiracy).

Relying on *Overton*, *supra*, defendants contend that the court did not properly apply the safeguards appropriate "for the admission of evidence at trial involving multiple defendants: clear rulings on admissibility, limitations on the relevance of evidence vis-a-vis a particular defendant, and adequate instructions." *Id.* at 15, 298 S.E. 2d at 704. Defendant Carter points particularly to the absence of any instructions relating to the relevance of the independent acts or statements of defendant Rozier as evidence of Carter's guilt. No authority is cited to support the proposition that such instructions are *required*: the court clearly instructed the jury that it must consider each defendant and each offense separately. No hearsay statements by absent co-conspirators (except those attributed by defendants to Autry) came in. On this record no prejudicial error appears.

VII

Defendants assign as error the court's denial of their motions for mistrial made upon the conclusion of the prosecutor's argu-

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ment to the jury. Various statements made by the prosecutor precluded any possibility of a fair trial, they contend.

Counsel are allowed wide latitude in their arguments to the jury, subject to the discretionary control of the trial court. The court's exercise of its discretion in controlling argument will not be disturbed absent gross abuse. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978).

[12] The prosecutor characterized a question posed by defense counsel concerning willingness to lie to stay out of prison as "slick." Defense counsel immediately objected; the court sustained the objection and instructed the jury to disregard the characterization. Thus, the impropriety, if any, was cured. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982).

[13] Defendants also contend that they were unfairly characterized as "the devil." This came after defendants characterized the accomplice as a cunning liar and prostitute in their arguments. In response, the prosecutor described to the jury the world of prostitution and bikers' clubs the case had shown them:

MR. BOWEN [Assistant District Attorney]: . . . It's a place we've seldom been and maybe that most of us don't particularly want to go. But we've got two more visitors to those same places here on trial. And I've heard it said that if you want to try the devil—

MR. CRUMPLER [for defendant Rozier]: Objection.

MR. BOWEN: —you're going to have to go to hell to get your witnesses.

MR. CRUMPLER: Objection.

THE COURT: Overruled.

Taken in context, the prosecutor's metaphor falls short of the direct name-calling, see *State v. Davis*, 45 N.C. App. 113, 262 S.E. 2d 329 (1980), or vituperative hyperbole, see *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967), which has been found to be reversible error in other cases. It did not "torture the sense of the record" sufficiently to deprive defendants of a fair trial. *State v. Earnhardt*, 56 N.C. App. 748, 290 S.E. 2d 376, *aff'd in relevant*

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part, 307 N.C. 62, 296 S.E. 2d 649 (1982) (argument that defendants were "acting like a pack of wolves" not reversible error).

[14] At another point, the prosecutor began to relate an anecdote about a small child, apparently intending to tell how her life had been ruined by drugs. Defendants promptly objected and the court sustained their objection. The prosecutor then argued to the jury in general terms that children are naturally curious and "that in the drug world, there are those who would play upon that natural curiosity." Defendants' objection was overruled. This precise situation has been before this Court before, and we held that while such remarks are not condoned the court did not abuse its discretion in overruling defendants' objection. *State v. Gagne*, 22 N.C. App. 615, 207 S.E. 2d 384, *cert. denied*, 285 N.C. 761, 209 S.E. 2d 285 (1974).

[15] Finally, at the close of his argument, the prosecutor suggested to the jury that "there's maybe a higher law" than the court's. He read to the jury from the Bible, specifically 1 Corinthians 3:16, " 'know ye not that ye are the temple of God and that the spirit of God dwelleth in you? If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple are ye.' " The prosecutor repeated the "him shall God destroy" language and noted that there was no death penalty in this case. Defendants objected promptly to all the foregoing arguments; the court sustained the objections, except as to the Biblical language itself. No corrective instructions were given at that time. The prosecutor then told the jury that they could nevertheless ensure that defendants would be out of the drug business for a long time and therewith ended his argument. The court immediately instructed the jury to disregard any statements to which objections had been sustained. Defendants argue that this argument constituted an improper appeal to the passions of the jury, and that the prosecutor attempted to convince the jury that no penalty short of death was too severe for these defendants. The court sustained their objections to the "higher law," death penalty, and destruction remarks. Within a few moments, while the matter was still fresh in the jurors' minds, the court gave a curative instruction. Ordinarily, where the court sustains an objection to improper argument and immediately gives a curative instruction, the impropriety is cured. *State v. Woods, supra*. The "blanket" instruction given at the end of argu-

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ment is not approved, but in this instance it was sufficient to cure the impropriety. Although the record tends to indicate that the prosecutor tread close to the limits of propriety, we do not find any single transgression sufficient to compel a finding of prejudicial error. Nor does the argument as a whole compel such a result. Therefore, this assignment is overruled.

VIII

[16] The court gave an instruction on interested witnesses; it did not give the pattern accomplice instruction, despite defendants' request, in view of the "number of interested witnesses" who had testified. Defendants claim prejudicial error, although they did not preserve their objection as required by App. R. 10(b)(2). A comparison of the requested instruction, N.C.P.I.—Crim. 104.25, and the instructions given indicates that the substance of the requested instruction was in fact given in any event. The only significant portion of the text omitted was the definition of accomplice; the court instructed the jury that the accomplice was charged with the same criminal offenses as defendants and had entered pleas of guilty, and told them that she was "considered by the law to have an interest in the outcome of the trial." The court then gave the appropriate scrutiny instruction. Defendants were entitled to an instruction *in substance* on the accomplice testimony. *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975). This they received. The jury was fully informed of the character of the witness and the nature of her agreement with the State. See *State v. Morgan*, 60 N.C. App. 614, 299 S.E. 2d 823 (1983). This assignment is accordingly overruled.

IX

The court consolidated the felony convictions arising from the 9 June 1982 transactions for judgment. The convictions arising from the transactions of 15 June 1982 were similarly consolidated. The most serious offense in each group, trafficking, is a Class G felony, which carries a presumptive sentence of 4½ years. G.S. 15A-1340.4(f). For each defendant for each group of convictions the court made the following findings in aggravation: (1) that defendant had a prior conviction punishable by more than 60 days' confinement, (2) that the statutory minimum sentence for trafficking is seven years, and (3) that defendant had been convicted of offenses subject to consecutive sentences but which had

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been consolidated for judgment. Defendants respectively received consecutive sentences of ten and twelve years for each group of felonies.

A

[17] Defendants contend that the court's failure to make separate findings tailored to each offense constitutes prejudicial error. *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983), clearly requires that:

in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

The State has advanced no compelling reason to support its contention that *Ahearn* does not apply here. Therefore, the court erred by failing to make separate findings tailored to each offense.

B

It is now firmly established, however, that failure to comply with *Ahearn* does not automatically constitute prejudicial error. *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437 (1984). Both defendants had three consolidated convictions arising out of the events of 9 June 1982: felonious possession with intent to sell or deliver cocaine, felonious sale or delivery, and felonious conspiracy to traffic. These are Class H, Class H, and Class G felonies, respectively, with the conspiracy (Class G) conviction carrying a statutory minimum seven-year sentence, and the others presumptive sentences of three years. G.S. 15A-1340.4(f); 90-95(b)(1); 90-95(h)(3); 90-95(i). With no finding whatsoever of aggravating factors, then, the court could have sentenced defendants to thirteen years imprisonment, instead of the ten years imposed. Accordingly, defendants have shown no prejudicial error; the sentences imposed represented the judgment of the trial court, in its discretion, as to the appropriate punishment and were within its power to impose. Remanding this case for resentencing, therefore, would be purposeless. *State v. Locklear*, 61 N.C. App. 594, 301 S.E. 2d

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437, *disc. review denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983) (allegedly improper aggravating factor not prejudicial where possible presumptive sentences totalled forty years and defendant received sentence of only ten years). The sentences based on the 9 June 1982 convictions, therefore, are affirmed.

C

With respect to the two consolidated felonies based on the transactions of 15 June 1982, the court found as a factor in aggravation that defendants could have received consecutive sentences. However, we have already held that judgment must be arrested in each conspiracy case (Rozier—82CRS9743; Carter—82CRS9749). Without deciding whether the court could properly find the cited factor, then, it is clear from the facts that it no longer applies to each remaining substantive trafficking conviction. The sentences imposed are greater than the presumptive or statutory minimum. In this situation, every factor considered in aggravation by the trial court must be considered to have contributed to the severity of the sentence. *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Therefore, prejudicial error occurred and remand for resentencing of these cases, 82CRS9740 (Rozier) and 82CRS9748 (Carter), is proper.

D

[18] Defendant Carter contends that the court erred in failing to find as a mitigating factor that he was only a passive participant in these crimes. "[A] trial judge's failure to find a mitigating factor will be error where the evidence is (1) substantial or uncontradicted and (2) inherently credible." *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984). To show error, defendant must show that "'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.'" *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455 (1983), quoting *Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979).

Here, although there was substantial evidence that Rozier took the lead role, there was evidence before the court that Carter knowingly served as Rozier's messenger, that Carter went along with Rozier to ensure that the pickup on 9 June went

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smoothly, that Carter allowed his house to be used and was present at both transactions, and that he was ready to join in armed pursuit of the agent. This evidence allowed the court to reasonably infer that Carter was not a passive participant nor was his role minor. *Compare State v. Jones, supra* (factor compelled by uncontradicted evidence that defendant tried to persuade accomplice not to kill victim and waited outside during killing).

X

We conclude that with the exception of the 15 June 1982 conspiracy cases, all assignments relating to the guilt-innocence phase must be overruled; judgment in those two cases is arrested. For error in sentencing, the other 15 June 1982 felony cases must be remanded to the trial court. No error has been shown as to the misdemeanor or 9 June 1982 felony convictions. The result, therefore, is:

As to defendant Rozier:

Case 82CRS9740—remanded for resentencing;

Case 82CRS9743—judgment arrested; and

Cases 82CRS9741, 82CRS9742, 82CRS9744, and 82CRS9911—no error.

As to defendant Carter:

Case 82CRS9748—remanded for resentencing;

Case 82CRS9749—judgment arrested; and

Cases 82CRS9745, 82CRS9746, 82CRS9747, 82CRS9750, and 82CRS9926—no error.

Judges ARNOLD and PHILLIPS concur.

Snipes v. Jackson

EDGAR W. SNIPES v. GEORGE W. JACKSON, L. H. VEAZEY, AND THOMAS, KNIGHT, TRENT, KING AND COMPANY

No. 8314SC695

(Filed 19 June 1984)

1. Limitation of Actions § 4.2— negligence action against attorney and accountant concerning the sale of stock—action accruing at date of tax assessment

In an action instituted by plaintiff against his attorney, accountant and the accountant's firm seeking damages for the defendants' negligent rendering of professional services, the trial court erred in granting summary judgment on the possible basis that the statute of limitations had expired where the sale transaction, upon which defendants' advice had been sought, was closed on 30 December 1976, effective 1 January 1977; where on 4 March 1980 the Internal Revenue Service assessed a deficiency against plaintiff in the amount of \$48,659.43 as a result of the sales transaction; and where plaintiff instituted this action in 1981. Under the facts, neither apparent nor undiscovered loss occurred to plaintiff until the I.R.S. notified plaintiff of its assessment, and G.S. 1-15(c) requires as an element of the cause of action for malpractice that plaintiff suffered some loss or injury, whether it be apparent or hidden.

2. Accountants § 1— malpractice action—sufficiency of evidence

The trial court erred in granting summary judgment for defendant accountant in an action seeking damages for the accountant's negligent rendering of professional services in assisting plaintiff in the sale of his oil company where the forecast of evidence raised an issue regarding the accountant's knowledge of a transfer of stock to plaintiff prior to the sale which resulted in costly tax consequences, and where an issue of the accountant's negligence in failing to advise plaintiff of the tax consequences regarding this transfer was raised in an affidavit of an expert witness.

3. Attorneys at Law § 5.1— malpractice action—sufficiency of evidence

A trial court erred in entering summary judgment for defendant attorney in an action instituted by plaintiff seeking damages for the defendant's negligent rendering of professional services. Plaintiff's forecast of evidence raised questions of liability regarding the attorney's handling of the sale of a company in which plaintiff was the majority stockholder which resulted in a large assessment of taxes. The evidence indicated that the attorney admitted he had never discussed a stock transfer which resulted in the tax consequences with defendant accountant; that he was aware of the agency relationship between plaintiff and the other shareholders; that he did not draft any documents showing this relationship and that, although he was aware of the installment sale aspects of the sale, he indicated to plaintiff that it would be all right to transfer all stock in his company to plaintiff prior to the sale. Further, based on this evidence and other evidence in the depositions, another attorney filed a sworn affidavit indicating that the defendant attorney's practice may not have been in accordance with the standard of care of attorneys practicing in North Carolina.

Snipes v. Jackson

APPEAL by plaintiff from *Lee, Judge*. Judgment entered 21 April 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 April 1984.

Plaintiff instituted an action against his attorney, accountant and the accountant's firm in 1981 seeking damages for the defendants' negligent rendering of professional services. After considering the pleadings, depositions, affidavits, answers to interrogatories and exhibits, the trial court granted defendants' motions for summary judgment and plaintiff appealed. We believe that the record on appeal shows that genuine issues of fact exist regarding the negligence of the defendants and therefore reverse.

Plaintiff alleged in his complaint that he sought the advice of defendant George Jackson, a Roxboro attorney, and defendant L. H. Veazey, a Roxboro accountant, in 1976 regarding the sale of Snipes Brothers Oil Company, Inc. Plaintiff was the majority stockholder in this family owned corporation. Prior to the sale of the business to Community Products, Inc. (hereinafter Community) Veazey advised plaintiff to structure the sale of plaintiff's shares in installments in order to incur the smallest tax liability. Plaintiff accepted this advice and then retained Jackson to assist him and the other shareholders in the actual sale of stock. The remaining shareholders intended to sell all their shares and receive cash in one payment.

Jackson assisted in the drafting of the documents regarding the sale of Snipes Brothers Oil Company, Inc. Plaintiff alleged that both Veasey and Jackson discussed the manner in which the sale was to be structured and approved the sale documents. The sales transaction was closed on 30 December 1976, effective 1 January 1977. The structure of the actual sale involved the transfer of all stock in Snipes Brothers Oil Company, Inc. to plaintiff followed by the transfer of all shares to Community. Soon after the sale plaintiff gave each shareholder his or her share of the payment. It is uncontested that the sale was structured in this manner because of Community's desire to deal with only plaintiff at the closing.

Veazey thereafter prepared plaintiff's 1977 and 1978 tax returns showing the sale of plaintiff's stock as an installment sale. These returns were audited, and on 4 March 1980 the Internal Revenue Service assessed a deficiency against plaintiff in the

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amount of \$48,659.43. It is uncontested that this assessment was due to the fact that immediately prior to the sale of stock, plaintiff's family transferred their shares to plaintiff who then transferred them to Community. The terms of the sales contract indicated that plaintiff was the owner of all shares of stock in Snipes Brothers Oil Company, Inc.; that plaintiff was selling 1,429 shares of the stock to Community in return for cash and that plaintiff was selling the remaining 2,572 shares in return for installment payments. Because of this arrangement the I.R.S. argued that plaintiff did not qualify for the favorable installment sale treatment.

Plaintiff timely protested the assessment, and both defendants assisted him in this protest. On 1 December 1980, plaintiff settled with the I.R.S. by paying \$24,200.13 and \$4,237.54 as a late payment. Plaintiff was also assessed \$6,760.78 by the North Carolina Department of Revenue.

Plaintiff alleged the following in his complaint:

22. That the defendants, for consideration and being aware of the plaintiff's desire to receive the most favorable tax treatment, undertook to represent and advise the plaintiff in planning and executing the aforesaid sale; that defendants were consulted about, drafted, modified, and/or reviewed the documents of sale used in effecting said sale; that the defendants were aware of the transfer of all shares of Snipes Brothers Oil Company, Inc. to the plaintiff prior to transferring the same to Community; and that the defendants prepared, advised, and/or assisted in the preparation of plaintiff's tax returns for the 1977 and 1978 tax years, and participated in subsequent audits, and/or appeals from assessments resulting from said audits.

20. That in rendering professional services to the plaintiff, including but not limited to those set forth in the preceding paragraphs, the defendants, and each of them, were negligent in that they failed to exercise the proper degree of professional care in ascertaining and planning for the Federal and State tax consequences of the aforesaid sale by plaintiff.

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21. That as a direct and proximate result of the aforesaid negligence, the plaintiff has been damaged, both directly and consequentially, in an amount in excess of \$10,000.00.

In his answer defendant Veazey alleged that he had no knowledge of the transfer of all shares of stock to plaintiff prior to the 1979 audit. Defendant Jackson alleged in his answer that he and plaintiff specifically agreed that Jackson would not advise or represent plaintiff regarding tax implications of the sale; and that plaintiff informed him that Veazey was plaintiff's tax advisor and had approved the documents of sale. Both defendants pled the statute of limitations as a defense. Veazey also pled the defense of contributory negligence.

Plaintiff replied that defendants were equitably estopped from pleading the statute of limitations, because defendants assisted him in the appeal of the tax assessments and at no time indicated their negligence was the cause of the assessments.

Plaintiff appeals from the granting of defendants' motions for summary judgment.

Maxwell, Freeman, Beason and Morano, by James B. Maxwell and Mark R. Morano, for plaintiff appellant Edgar W. Snipes.

Spears, Barnes, Baker & Hoof, by Alexander H. Barnes, for defendant appellee George W. Jackson.

Mount, White, King, Hutson & Carden, by Richard M. Hutson, II and Elizabeth R. Stuckey, for defendant appellees Veazey and Thomas, Knight, Trent, King and Company.

ARNOLD, Judge.

Since the trial court did not specify the grounds upon which defendants' motions for summary judgment were granted, this Court must examine every basis for the rulings. The record on appeal indicates that summary judgment in defendants' favor could have been entered because the trial court believed plaintiff's action was barred by the statute of limitations. In the alternative the court may have decided there was no issue of fact regarding the allegations of negligence. Summary judgment in defendant Veazey's favor also could have been entered because the court found no issue of fact as to plaintiff's contributory negligence.

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STATUTE OF LIMITATIONS DEFENSE

[1] The parties stipulated that the action was commenced against defendant Jackson on 4 September 1981 and against defendant Veazey and his employer on 19 November 1981. Defendants contend that the cause of action accrued at the time that the sale of stock to Community became effective on 1 January 1977. They argue that summary judgment in their favor was proper because the malpractice action was governed by G.S. 1-15(c) and should have been brought within four years of the stock sale. Plaintiff initiated his action after this period had expired.

Plaintiff argues on appeal that his action was not barred by G.S. 1-15(c) because it was commenced within three years of the "last act" of defendants, because defendants are equitably estopped from raising the statute of limitations defense and because the statute of limitations did not begin to run until the I.R.S. notified plaintiff of the assessment. After examining the language in G.S. 1-15(c), the general law involving statutes of limitations and pertinent law in other jurisdictions involving the accrual of malpractice actions in tax matters, we conclude as a matter of law that plaintiff's claim was not barred by G.S. 1-15(c). Plaintiff's action did not accrue until he was notified of the tax assessment.

A number of jurisdictions generally have concluded that a cause of action involving malpractice in tax matters does not accrue until the I.R.S. assesses a deficiency. Annot., 26 A.L.R. 3d 1438 (1969). The North Carolina courts have not specifically addressed this issue. After examining other jurisdictions' reasons for starting the limitation period from the date of assessment, we have decided that equity requires us to apply the same accrual date to the situation here.

In *Atkins v. Crosland*, 417 S.W. 2d 150 (Tex. 1967), the taxpayer sued his accountant for negligently changing the method of tax accounting for taxpayer's business without first obtaining permission from the Commissioner of Internal Revenue. Taxpayer was subsequently assessed with a tax deficiency. The lower court granted defendant's motion for summary judgment on the ground that the taxpayer's action was barred by the statute of limitations. The Texas Supreme Court reversed and concluded that taxpayer's action did not accrue until the deficiency was assessed.

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The Court applied the general principle that a legal injury must be sustained before a cause of action arises. The Court emphasized:

Prior to assessment the plaintiff had not been injured. That is, assessment was the factor essential to consummate the wrong—only then was the tort complained of completed. If a deficiency had never been addressed, the plaintiff would not have been harmed and therefore would have had no cause of action.

Id. at 153.

The Supreme Court of Delaware applied the same accrual date in a malpractice action against an accountant for similar misconduct. *Isaacson, Stolper & Co. v. Artisan's Savings Bank*, 330 A. 2d 130 (Del. Supr. 1974). The Delaware court concluded that the facts provided an exception to the general rule that the statute of limitations begins to run at the time of the wrongful act and that ignorance of a cause of action, absent concealment or fraud, does not abate the running. The Court, adopting language from the court below, stated:

[T]he statute should not run against an ignorant plaintiff, particularly where the "triggering" of the cause of action depends on the action of a third party. This approach has obvious application to a taxpayer who does not know he has suffered a loss until the taxing authority asserts a claim. In such a triangular situation it would clearly work an injustice to expect Artisan's [taxpayer] to anticipate, or even be aware of, a possible injury.

Id. at 133. Just as the taxpayers in the foregoing opinions, plaintiff here suffered no legal harm or loss until the tax deficiency was assessed on 4 March 1980. Until this time neither defendant was liable to plaintiff.

Our decision to start the running of the limitation period from the date of assessment is not inconsistent with present North Carolina law. G.S. 1-15(a), a general provision applicable to all statutes of limitations, provides: "Civil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*, except where in special cases a different limitation is prescribed by statute." (Emphasis added.) "In no event can a statute of limitations begin to run until plain-

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tiff is entitled to institute action. (Citation omitted.)" *Raftery v. Construction Co.*, 291 N.C. 180, 183, 230 S.E. 2d 405, 407 (1976).

G.S. 1-15(c) provides for a special limitation period for malpractice actions against professionals. The statute provides, in pertinent part:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is . . . economic or monetary loss . . . which originates under circumstances making the . . . loss . . . not readily apparent to the claimant at the time of its origin, and the . . . loss . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

It is uncontested that the action "giving rise to" the tax assessment was the sales contract dated 1 January 1977. Defendants concede that the loss in taxes attributable to this sale was not apparent to plaintiff until he was notified of the assessment on 4 March 1980. Defendants argue, and the lower court apparently agreed, that G.S. 1-15(c) required plaintiff to commence suit against defendants within one year of the date of the tax assessment or "discovery of the loss."

A close reading of the language in G.S. 1-15(c) refutes defendants' argument. G.S. 1-15(c) refers to an action arising out of the performance or failure to perform professional services which results in either immediate injury or loss or such injury or loss "which is not readily apparent to the claimant at the time of its origin."

In the facts before us neither apparent nor undiscovered loss occurred to plaintiff on 1 January 1977 when the sale occurred.

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No loss occurred until the I.R.S. notified plaintiff of its assessment. Although the statute of limitations set out in G.S. 1-15(c) begins to run at the time of the last negligent act or breach of some duty, and not the time actual damage is discovered or fully ascertained, this statute still requires as an element of the cause of action for malpractice that plaintiff suffer some loss or injury, whether it be apparent or hidden. Plaintiff's cause of action against defendants was not complete and did not fully arise until he was assessed by the I.R.S.

If plaintiff had commenced his action prior to the date of assessment, defendants could have properly objected on the ground that the action was premature. No loss or injury had occurred before the assessment. Moreover, there was a reasonable belief that the I.R.S. would recognize an installment sale of plaintiff's shares. Although the document of sale indicated that plaintiff was the owner of all shares in Snipes Brothers Oil Company, Inc. and was selling all shares to Community, the document also indicated that 1,429 shares were being sold for cash and the remaining 2,572 were being sold in installments. There is also undisputed evidence in the record that soon after the sale plaintiff submitted to each shareholder full payment of the sales price for his or her shares. Based on this evidence, the I.R.S. could have agreed that plaintiff was merely acting as an agent for the other shareholders in the sale of their stock to Community.

Finally, we emphasize that the malpractice action against Veazey and Jackson is not directly analogous to professional negligence suits against doctors or attorneys in general. Here there is no loss or injury unless a third party, the I.R.S., decides to assess a tax deficiency.

SUMMARY JUDGMENT AGAINST DEFENDANTS

Having concluded that summary judgment in defendants' favor would have been improper on the ground that plaintiff's action was barred by the statute of limitations, we must now decide whether summary judgment was proper because no genuine issue of fact existed regarding defendants' negligence. In considering this question we are guided by the following principles:

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on the motion the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971).

Summary judgment is, furthermore, a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a *prima facie* case or that he will be able to surmount an affirmative defense.

Dickens v. Puryear, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981).

PLAINTIFF'S FORECAST OF EVIDENCE

The plaintiff in the case before us alleged that defendants, in rendering professional services regarding plaintiff's sale of stock to Community, "were negligent in that they failed to exercise the proper degree of professional care in ascertaining and planning for the Federal and State tax consequences of the aforesaid sale by plaintiff." When the evidence appearing in the record is viewed in the light most favorable to plaintiff, it raises material issues of fact regarding this negligence.

In his deposition plaintiff testified that prior to the sale of the stock in Snipes Brothers Oil Company, Inc., he consulted with his accountant, defendant Veazey. Veazey indicated that there would be a substantial tax saving if plaintiff sold his stock in installments. Plaintiff told Veazey he wanted to proceed with the sale in this manner. Plaintiff later learned from Community that it preferred to deal with only one shareholder. Plaintiff informed Veazey of this request, and Veazey advised plaintiff to get legal help. Plaintiff then conferred with defendant Jackson. He told Jackson he was receiving tax advice from Veazey and related Community's desire to deal solely with plaintiff. Jackson indicated that at the date of closing all stock could be placed in plaintiff's name, and that plaintiff could then transfer the stock to Community. After plaintiff was paid for the stock, he could then give each shareholder his share of the payment.

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Plaintiff testified that in late December 1976 he carried a proposed sale document, drafted by Community's attorney, to Jackson's office. This contract stated that plaintiff was the owner of all shares of outstanding stock in Snipes Brothers Oil Company, Inc. Plaintiff told Jackson that he had discussed the tax consequences with Veazey and asked Jackson to call Veazey and verify this fact.

Jackson testified in his deposition that he telephoned Veazey either the 28th or 29th of December 1976 at plaintiff's request. Jackson asked Veazey if he was familiar with the sales transaction. According to Jackson, Veazey responded that he was and that the transaction was all right from a tax point of view. Jackson admitted that he did not discuss the stock transfer with Veazey. He also admitted that he was aware plaintiff was acting as an agent for his family during the sales transaction, and that he did not discuss with or propose to plaintiff the drafting of an agreement describing this agency relationship.

In his deposition Veazey testified that he did not recall talking with Jackson prior to the sale. Plaintiff testified, however, that prior to the sale he told Veazey that all stock would be transferred to him (plaintiff) before it was transferred to Community.

NEGLIGENCE OF DEFENDANT VEAZEY

[2] It is generally recognized that an accountant may be held liable for damages naturally and proximately resulting from his failure to use that degree of knowledge, skill and judgment usually possessed by members of the profession in a particular locality. 1 Am. Jur. 2d *Accountants* § 15 (1962). An accountant may be liable for loss or damage due to erroneous tax advice or management. *Id.* at § 18.

The foregoing forecast of evidence raises an issue regarding Veazey's knowledge of the transfer of all stock to plaintiff prior to the sale to Community. An issue of Veazey's negligence in failing to advise plaintiff of the tax consequences regarding this transfer was raised in an affidavit of an expert witness. Mark Stephens, a certified public accountant practicing in Durham, swore that he was familiar with the generally accepted standards for the practice of accounting in North Carolina during 1976 and

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1977. Based upon the depositions of the parties, Stephens swore that he possessed the following opinions:

12. . . . [I]t is my opinion that generally-accepted standards of accounting practice in North Carolina in 1976 and 1977 would have required that an accountant advise, warn, or otherwise inform his client that transferring all of the stock in a corporation to one person (such as his client) from all the other shareholders immediately prior to transferring that stock or redeeming it, may have an adverse impact on that sale qualifying for favorable tax treatment as an installment sale. It is my further opinion that, under such circumstances, an accountant should warn or advise his client to have that accountant or some other party investigate the circumstances of such a transfer, and to determine what way, if any, such a transfer may be made without disqualifying the sale for installment treatment under I.R.C. § 453, especially in view of the then-applicable requirement that not more than thirty percent (30%) of the selling price may be received in the first year.

13. . . . [I]f it further be found that Mr. Veazey had reviewed the closing documents referred to in paragraph 11 (final documents of sale) or was familiar with their contents, it is also my opinion that it would not have been in accordance with generally-accepted standards of accounting practice in North Carolina in 1976 and 1977 for that accountant to indicate to his client or his client's attorney that the closing documents were acceptable, when those documents indicate that Mr. Snipes was the owner of all of the stock and was to receive all of the consideration therefor, when in fact for approximately 1,101 of the 4,001 shares involved, Mr. Snipes was serving as only an agent or conduit for his family. . . .

Since the facts asserted by plaintiff must be accepted as true and since the affidavit of Stephens must be indulgently treated, the trial court erred in granting summary judgment in defendant Veazey's favor.

This Court must also consider Veazey's defense of contributory negligence as a proper ground for summary judgment. Veazey alleged in his answer that plaintiff was contributorily negligent in failing to disclose to Veazey the "purchase and/or

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transfer of all the stock of Snipes Brothers Oil Company, Inc. to himself and further, by actually transferring and/or purchasing said stock." Plaintiff's deposition clearly disputes this allegation and therefore raises an issue of fact for the jury.

NEGLIGENCE OF DEFENDANT JACKSON

[3] An attorney who engages in the practice of law and contracts to prosecute an action for his client

is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. (Citations omitted.)

Hodges v. Carter, 239 N.C. 517, 520, 80 S.E. 2d 144, 146 (1954). Plaintiff's forecast of evidence clearly raises questions of liability regarding defendant Jackson's handling of the sales transaction.

Jackson admitted that he never discussed the stock transfer to plaintiff with defendant Veazey; that he was aware of the agency relationship between plaintiff and the other shareholders; that he did not draft any document showing this relationship and that, although he was aware of the installment sale aspects of the sale to Community, he indicated to plaintiff that it would be all right to transfer all stock in Snipes Brothers Oil Company, Inc. to plaintiff prior to the sale. Based on this evidence and other evidence in the depositions, John Crill, a Durham attorney, filed a sworn affidavit. Crill swore that he was familiar with the standard of care of practicing attorneys in North Carolina, including those engaged in the representations of small corporations. He further swore:

5. . . . [I]t is my opinion that an attorney practicing law in accordance with the standard of care for attorneys practicing in North Carolina in 1976 and 1977, when representing a client in a sale of corporate stock involving acknowledged serious tax consequences as a result of an installment sale, the attorney would be required to consult with qualified tax advisors prior to consummating that transaction, and to review in detail the final closing documents with that tax advisor. This is especially so when the attorney holds himself

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out as not being fully qualified in tax matters, and disclaims responsibility therefor. It is my further opinion that the attorney is required to review the final documents with that tax advisor and to obtain from that advisor an assurance that the final transaction, as structured by the closing documents, accurately reflects the intended plan for the sale from a tax point of view.

6. It is my further opinion that it is not in accordance with the standard of care of attorneys practicing in North Carolina in 1976 and 1977 for an attorney, who does not regard himself to be an authority on tax matters, to nevertheless proceed to represent a client in the sale of corporate stock involving an installment sale without obtaining the assistance and guidance of a qualified tax advisor.

7. It is my further opinion that it is not in accordance with the standard of care for attorneys practicing law in North Carolina in 1976 and 1977 to negotiate and conclude, on behalf of his client, a contract of sale that states that his client is the owner of all outstanding shares of stock in a corporation and that he is to receive all the consideration for that stock, when in fact it is known and acknowledged by that attorney that a substantial portion of that stock is owned by his client's family members, and that he is merely acting as agent for his family members. It is my further opinion that it is not in accordance with the standard of care for attorneys practicing law in North Carolina in 1976 and 1977 for an attorney to allow stock to be transferred from other individuals to his client as their agent without a separate agreement of some type being prepared reflecting that such an agency relationship had been created.

The pleadings, depositions of the parties, exhibits and affidavits of expert witnesses forecast evidence which necessitates a jury trial.

For the reasons stated above, defendants' motions for summary judgment were improvidently granted.

Reversed and remanded.

Judges HEDRICK and PHILLIPS concur.

In re Durham Annexation Ordinance

IN THE MATTER OF CITY OF DURHAM ANNEXATION ORDINANCE
NUMBERED 5991 FOR AREA A AND IN THE MATTER OF CITY OF DUR-
HAM ANNEXATION ORDINANCE NO. 5992 FOR AREA B

No. 8314SC891

(Filed 19 June 1984)

1. Municipal Corporations § 2— annexation statutes—general laws not required

Statutes setting out the involuntary annexation procedure applicable to cities of 5,000 or more did not violate Art. XIV, § 3 of the N. C. Constitution because certain counties were exempted therefrom since laws relating to annexation are not required to be general or uniformly applicable laws. Art. II, § 24 of the N. C. Constitution; G.S. 160A-56.

2. Rules of Civil Procedure § 52— non-jury trial—sufficiency of court's findings

The trial court's findings of fact in a proceeding to review two annexation ordinances constituted ultimate facts and therefore complied with G.S. 1A-1, Rule 52(a)(1).

3. Municipal Corporations § 2.3— annexation—no metes and bounds description in original ordinance

Annexation ordinances were not invalid because metes and bounds descriptions were not included with the ordinances when they were originally adopted by the City Council but were added to the ordinances before they were later ratified by the Council where the descriptions were placed before the Council and the public as part of the annexation report, and the area and proximity maps and the landmark descriptions were before the City Council and public as part of the notices of hearing.

4. Municipal Corporations § 2.3— annexation—sewer services for new areas

A city's planned sewer services for an annexed area complied with G.S. 160A-47(3) where the city indicated in its annexation report that contracts for the extension of major sewer outfall lines in the area would be let and construction would begin within twelve months after the effective date of annexation, it not being necessary for the city actually to provide sewer services within the twelve-month period.

5. Municipal Corporations § 2.3— annexation—police protection for new areas

A city's planned police protection for newly annexed areas met the requirements of G.S. 160A-47(3), although such plans did not include any provision for hiring additional detective or juvenile personnel, where the annexation report indicated that three patrol units would be added to the police department in order to provide sufficient law enforcement services in one area and that additional resources were not needed to provide adequate police services to the second area.

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6. Municipal Corporations § 2.3— annexation—fire protection services for new areas

A city met the requirements of G.S. 160A-47(3)a for providing fire protection services to newly annexed areas where the annexation report indicated that tanker service would be available in some sections to provide water until water mains and fire hydrants are installed. Furthermore, G.S. 160A-47(3)a was not violated because response times of fires will be longer in the newly annexed areas than in the rest of the city.

7. Municipal Corporations § 2.3— annexation—use of natural topographic features for boundaries

Petitioners failed to carry their burden of showing that annexation ordinances were invalid on the ground that the city failed to utilize natural topographic features in determining the boundaries of the annexed areas as required by G.S. 160A-48(e) where they failed to show that the boundaries could have been drawn along the topographic features which they proposed.

APPEAL by petitioners from *McLelland, Judge*. Judgment entered 15 March 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 May 1984.

On 7 October 1982 petitioners filed two petitions for review wherein they prayed that two ordinances purporting to annex petitioners' land to the City of Durham be declared null and void. In the alternative petitioners prayed that Article 4A, Chapter 160A *et seq.* be declared unconstitutional, or that the ordinances be rescinded or amended. The City of Durham responded that the annexation ordinances were duly enacted. The City denied petitioners' allegations of unconstitutionality.

After lengthy discovery, the matter was heard before Judge McLelland without a jury. At the close of petitioners' evidence, the City moved for dismissal pursuant to Rule 41(b) of the Rules of Civil Procedure. Judge McLelland heard arguments of the parties and granted the City's motion to dismiss. In his judgment, he decreed that the two annexation ordinances were valid and enforceable. From this judgment in the City's favor, petitioners appeal.

Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for petitioner appellants.

W. I. Thornton, Jr. and Brenda M. Foreman, for respondent appellee.

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ARNOLD, Judge.

Petitioners have assigned error to the following findings of fact and conclusions of law in Judge McLelland's judgment:

FINDINGS OF FACT

1. The statutory procedure for annexation contained in North Carolina General Statutes Chapter 160A, Article 4A, part 3 consisting of Sections 160A-45 through 160A-56 and primarily contained in Section 160A-49 was followed by the Respondent, City of Durham, substantially and without any irregularity which misled or substantially prejudiced the interests of any of the petitioners.

2. The record filed by Respondent pursuant to G.S. 160A-50 demonstrates that the provisions of G.S. 160A-47 were met in that: i) The City of Durham prepared and made available for public review at least 14 days prior to the public hearing a report setting forth the City's plans to provide police and fire protection, garbage collection, street maintenance and other services to the people in the areas to be annexed together with maps of the City and adjacent areas showing the present and proposed boundaries of the City and, as to the areas to be annexed, showing water and sewer mains, proposed extensions of mains and outfalls, general land use patterns in the areas, and a statement showing that the areas to be annexed are of the character subject to annexation as specified in G.S. 160A-48, and ii) the plans for extending fire protection and other municipal services, including police protection, to the areas to be annexed on substantially the same basis and in substantially the same manner on the date of annexation, June 30, 1983, as provided to the rest of the city before that date are adequate and sufficient.

3. The provisions of G.S. 160A-48 have been met in that the areas annexed under the ordinances are of the character specified in the statutory sections specifically set forth in the annexation report filed with this court for its review pursuant to G.S. 160A-50 and in that the boundaries of the annexed areas follow natural topographic features where practical.

. . . .

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CONCLUSIONS OF LAW

1. The North Carolina General Statutes Chapter 160A, Article 4A, part 3 establishing the annexation procedure applicable to cities of 5,000 or more population is valid and does not violate any constitutional provision of the State of North Carolina or of the United States.

2. The annexation ordinances No. 5991 and No. 5992 adopted on September 7, 1982 as certified to the Court for review are valid as of that date.

[1] We first examine petitioners' argument that the trial court erred in concluding that the statutes setting out the annexation procedure applicable to cities of 5,000 or more are unconstitutional. In their petitions for review, petitioners alleged that the involuntary annexation provisions of Part 3, Article 4A, Chapter 160A were unconstitutional because they violated Article II, Section 24(1)(h) and Article XIV, Section 3 of the North Carolina Constitution. Petitioners further alleged that the statutes violated their constitutional rights to due process and equal protection.

On appeal petitioners argue only that the annexation statutes at issue violate Article XIV, Section 3. *General laws defined.* A close reading of Section 3 and other pertinent sections of the Constitution leads us to the conclusion that Article XIV, Section 3 does not apply to the annexation laws.

Part 3 of Chapter 160A of the North Carolina General Statutes deals with the annexation by cities of 5,000 or more people of areas adjacent or contiguous to existing municipal boundaries. The statutes therein provide the authority to annex (G.S. 160A-46), set forth the prerequisites to annexation (G.S. 160A-47), establish the characters of areas to be annexed (G.S. 160A-48), establish the procedure for annexation (G.S. 160A-49) and provide the basis upon which property owners in an annexed area may seek judicial review of an annexation ordinance (G.S. 160A-50).

At the time the City of Durham initiated annexation proceedings pursuant to Part 3, G.S. 160A-56 expressly exempted the counties of Columbus, Halifax, Pender and Perquimans from Part 3. G.S. 160A-56 has since been repealed, effective 29 June 1983, by the 1983 N.C. Sess. Laws c. 636, s. 27. Also at the time of the annexation proceedings on appeal, Cumberland County was ex-

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empt from Part 3 pursuant to a local act adopted by the General Assembly in 1969. This act provided that voters residing in areas to be annexed in Cumberland County pursuant to either Part 2, *Annexation by Cities of Less Than 5,000*, or Part 3 of Chapter 160A may file a petition in opposition and effectively block annexation. See *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980).

Petitioners argue that by exempting certain counties from Part 3 of the annexation statutes, such as Halifax and Cumberland which contain cities of over 5,000 people, the General Assembly rendered the general laws regarding annexation non-uniform and thus violated Article XIV, Section 3 of the North Carolina Constitution.

Article XIV, Section 3 defines general laws as follows:

Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, *and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State.* [Emphasis supplied by petitioners.] General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act. (1969, c. 1200, s. 1.)

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Petitioners have obviously overlooked the language in the first sentence of Section 3, which prohibits only the enactment of special or local laws concerning subject matters directed or authorized by the Constitution "to be accomplished by general or uniformly applicable laws."

Examples of sections of the North Carolina Constitution governed by Article XIV, Section 3 are those involving taxation and the retirement of judges and justices. Article V, Section 2. *State and local taxation* provides in paragraph (2) that "[n]o class of property shall be taxed except by *uniform rule*, and every classification shall be made by *general law uniformly applicable* in every county, city and town, and other unit of local government" (emphasis supplied). In paragraph (3) our Constitution mandates that every exemption from taxation "shall be made by *general law uniformly applicable* in every county, city and town, and other unit of local government." (Emphasis supplied.) In Article IV, Section 8, the Constitution requires that the General Assembly provide for the retirement of justices and judges by *general law*.

Article II, Section 24 sets out fourteen different subjects on which the General Assembly is expressly prohibited from enacting local, private or special acts or resolutions. Only general laws can be enacted to regulate these subjects. See Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340 (1966-1967) for a comprehensive history of local legislation in the General Assembly and the courts. One of the prohibited subjects in Article II, Section 24 is "Erecting new townships, or changing township lines, or establishing or changing the lines of school districts." Article II, Section 24(1)(h). At first glance it appears that G.S. 160A-56, exempting certain counties from Part 3 of the annexation statutes, would constitute a local act in violation of subsection (h). The annexation statutes, however, do not themselves erect new townships or change township lines. They merely authorize various townships to change their lines by various procedures.

The North Carolina Supreme Court applied this same rationale in *In re Assessments*, 243 N.C. 494, 91 S.E. 2d 171 (1956). There the petitioners argued that an act applicable only to the City of Durham which authorized the municipality to make street

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improvements and to assess the cost against abutting property owners without a petition, was a violation of Article II, Section 29 (now Article II, Section 24(1)(c)). This subsection precludes the General Assembly from "[a]uthorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys." The Court found no constitutional violation because the local act was merely declaratory of the powers given the City of Durham under the general law and did not authorize the laying out, altering or maintaining a particular street or streets.

The annexation statutes set out in G.S. 160A *et seq.* are clearly consistent with the authority granted to the General Assembly by our Constitution in Article VII, Section 1.

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions, as it may deem advisable.

There is no express language in Section 1 which directs the General Assembly to provide for the fixing of boundaries of counties, cities and towns by general laws.

The argument that general laws are required to enact annexation ordinances regarding cities of 5,000 or more persons was dispelled in *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961). The Court found no merit to petitioners' argument that Part 3 of the annexation statutes was invalid, because twelve counties were excluded from its provisions. *See* 1959 N.C. Sess. Laws c. 1009, s. 12. Petitioners had argued "that such exclusion prevents the Act (Part 3) from being general in character within the purview of Article VIII, Section 4 of our Constitution." *Id.* at 650, 117 S.E. 2d at 804.

Article VIII, Section 4 provided: "It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning them credit. . . ." The Court emphasized that it has uniformly held that the requirement in Article VIII, Section 1, *Corporate charters*, with respect to general laws, refers only to

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private or business corporations. See *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920). The Court, citing *Holton v. Town of Mocksville*, 189 N.C. 144, 149, 126 S.E. 326, 328 (1925), stated:

Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations *additional powers* or restricting the powers theretofore vested in them. . . .

In re Ordinances, *supra* at 650-651, 117 S.E. 2d at 805.

The General Assembly possesses the authority under the North Carolina Constitution to create or extend a municipality and to give such powers to a municipality "as it may deem advisable." Article VII, Section 1. The only restriction on these powers is that they not be prohibited by our Constitution. The foregoing cases, along with the language of our Constitution, show that Article VII, Section 1 is not a power of the General Assembly which must be carried out or enacted by general laws as defined in Article XIV, Section 3.

Although petitioners have not argued an equal protection violation in their brief, we note that this Court, citing *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980), recently held that the trial court did not err in failing to conclude that Part 3 of Chapter 160A denied petitioners equal protection of the law. *In re Annexation Ordinance*, 62 N.C. App. 588, 303 S.E. 2d 380 (1983). Petitioners had unsuccessfully argued in their brief that the exclusion of some counties by the provisions of G.S. 160A-56, thereby making the residents therein subject to annexation only by referendum or petition, had no reasonable basis and denied equal protection to residents of non-excluded counties. We add that the North Carolina Supreme Court subsequently denied petitioners' request for discretionary review and allowed the City's motion to dismiss the appeal for lack of a substantial constitutional question. 309 N.C. 820, 310 S.E. 2d 351 (1983).

Having determined that the statutes governing the annexation of petitioners' lands to the City of Durham are constitutional, we turn to petitioners' remaining assignments of error.

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[2] Petitioners argue that the findings of fact in the judgment of dismissal do not comply with the requirements of Rule 52(a)(1). This rule of civil procedure provides that in actions tried without a jury, "the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Our courts have indicated, however, that Rule 52(a) requires only ultimate facts. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

Ultimate facts are those found in that vaguely defined area lying between evidential facts on one side and conclusions of law on the other. (Citation omitted.) In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. (Citations omitted.) An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. (Citations omitted.) Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. (Citations omitted.)

Quick v. Quick, 305 N.C. 446, 451-452, 290 S.E. 2d 653, 657-658 (1982), citing *Woodard v. Mordecai*, 234 N.C. at 472, 67 S.E. 2d at 645 (1951). We believe that the trial court's findings of fact constitute ultimate facts and therefore comply with Rule 52(a)(1).

We also find no merit to petitioners' assignment of error that the findings of fact are not supported by any evidence. G.S. 160A-50 allows limited judicial review of annexation ordinances, where a petitioner believes he "will suffer material injury by reason of the failure of the municipal governing board to comply with the (statutory) procedure . . . or to meet the (statutory) requirements set forth in G.S. 160A-48 as they apply to his property." "Upon review, petitioner must carry the burden of showing both non-compliance with statutory requirements and procedure and material injury flowing from such non-compliance." *McKenzie v. City of High Point*, 61 N.C. App. 393, 400, 301 S.E. 2d 129, 131, *disc. rev. denied*, 308 N.C. 544, 302 S.E. 2d 885 (1983). The record on appeal indicates that petitioners have not overcome this burden and supports the trial court's findings of fact.

[3] Under this assignment of error, regarding the insufficiency of the evidence to support the findings of fact, petitioners first

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argue that the annexation ordinances were improperly passed because the metes and bounds descriptions were prepared and added to the ordinances after they were purportedly adopted on 7 September 1982. The descriptions were added to the ordinances when they were later reviewed and ratified by City Council on 18 October 1982.

G.S. 160A-49(e)(1) requires that an ordinance passed by the governing board of a municipality describe the external boundaries of the annexed area by metes and bounds. Petitioners have not shown that they were materially prejudiced by this irregularity. Even though a metes and bounds description was not attached to each proposed ordinance on 7 September 1982, the descriptions were placed before the City Council and the public as part of the Annexation Report. In addition, the area and proximity maps of the annexed areas and the landmark description were before the City Council and public as part of the notices of hearing.

Petitioners next argue that the annexation ordinances are invalid for failure to provide for timely and substantially equal delivery of sewer service and fire and police protection. G.S. 160A-47(3)a requires that the City's annexation plans shall:

Provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines.

The evidence before this Court indicates that the City complied with this statute.

SEWER SERVICES

[4] Petitioners argue that the City's planned sewer services for Area A do not comply with G.S. 160A-47(3), because such services will not be provided until March, 1985. The effective date of annexation is 30 June 1983. They contend that G.S. 160A-49(h) gives

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a municipality twelve months at the most to implement a plan for extending services to an annexed area.

We agree with the City that petitioners have applied an incorrect timetable. In its Annexation Report, the City indicated that contracts for the extension of major sewer outfall lines in Area A would be let and construction would begin within a year of 30 June 1983. The applicable timetable is therefore set out in G.S. 160A-47(3)c. This statute directs that plans for the extension of sewer outfall lines "shall call for contracts to be let and construction to begin within 12 months following the effective date of annexation."

POLICE PROTECTION

[5] Petitioners argue that the planned police protection for Areas A and B does not meet the requirements of G.S. 160A-47(3)c, because the Annexation Report does not include any provision for the hiring of additional detective or juvenile personnel. The Annexation Report does indicate that three patrol units will be added to the Public Safety Department in order to provide sufficient law enforcement services in Area A. As to Area B, the Annexation Report reads: "No additional personnel, equipment, or operating expenses will be necessary to provide law enforcement . . . services to Area B because the City can provide Area B with law enforcement . . . services with currently budgeted resources." Petitioners have shown no violation of G.S. 160A-47(3) or any material injury flowing from this alleged violation. See *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (1961) (The Supreme Court held that the requirements of the applicable statute were met where the plans for police protection in the annexed area only called for the extension of jurisdictional boundaries and lengthened patrol routes.) and *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E. 2d 288 (1973), *modified and affirmed*, 22 N.C. App. 611, 207 S.E. 2d 275 (1974) (The extension of patrol routes into the annexed area constituted protection on substantially the same basis as such protection in the remainder of the Town, although no additional policemen were provided.).

FIRE PROTECTION

[6] Petitioners argue that they will not receive fire protection services equal to the services received by a majority of the pre-

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annexation citizens. Petitioners, however, have ignored that portion of the Annexation Report which indicates that in some sections of Areas A and B tanker service will be required to provide adequate fire flow until water mains and fire hydrants are installed. G.S. 160A-47(3)a only requires "reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines."

Petitioners further argue that G.S. 160A-47(3)a has been violated, because response times to fires will be longer in the newly annexed areas than in the rest of the City. A similar argument was rejected by this Court in a case also involving the annexation of land to the City of Durham. *In the Matter of City of Durham Annexation Ordinance No. 5791*, 66 N.C. App. 472, 311 S.E. 2d 898, *disc. rev. denied* 30 April 1984.

The foregoing evidence of planned services in the areas to be annexed supports the trial court's finding of fact that such services meet the requirements of G.S. 160A-47(3)a.

[7] Finally petitioners argue that the annexation ordinances are invalid, because the City failed to utilize natural topographic features in determining the boundaries of the annexed areas as required by G.S. 160A-48(e). We disagree.

During discovery the City Council admitted that in construing the boundary lines for annexation, it only reviewed areas proposed by the City Administration. The Council added, however, that this study of the City Administration included consideration and application of G.S. 160A-48(e). On cross-examination petitioners' witness proposed boundaries allegedly more consistent with topographic features, but admitted that he did not consider the revised area's qualifications for annexation nor the City's ability to provide services to the revised area.

In order to establish non-compliance with G.S. 160A-48(e), petitioners must show two things: (1) that the boundary of the annexed area does not follow topographic features, and (2) that it would have been practical for the boundary to follow such features. *Garland v. City of Asheville*, 63 N.C. App. 490, 305 S.E. 2d 66, *disc. rev. denied* 309 N.C. 632, 308 S.E. 2d 715 (1983). The testimony of petitioners' witness clearly reveals that petitioners

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have failed to carry their burden of showing that the boundaries of the annexed areas could have been drawn along the topographic features proposed by petitioners.

The evidence in the record supports the findings of fact in the judgment dismissing petitioners' action, and these findings support the trial court's conclusion that the annexation ordinances are valid.

Affirmed.

Judges HEDRICK and PHILLIPS concur.

STATE OF NORTH CAROLINA v. EDWIN LAVERNE ELLIOTT

No. 8327SC422

(Filed 19 June 1984)

1. Criminal Law § 102.2— opening argument—limiting to nature of defense—no abuse of discretion

A trial court properly limited defense counsel's opening statement in a prosecution for second-degree kidnapping and assault with a deadly weapon to the nature of defendant's defense and the evidence he intended to offer to support it.

2. Criminal Law § 66.1— testimony identifying defendant as perpetrator of crime —not inherently incredible

There was nothing inherently incredible about a prosecuting witness's ability to make an observation and identification of defendant where the evidence tended to show that on the night in question, there were lights along the front of the mall and in the mall's parking lot where the prosecuting witness was; the prosecuting witness's van was parked about eight car lengths from the entrance of the mall and directly in front of a "very bright" light that illuminated the inside of her van; that as her assailant stood in the doorway of the van, the prosecuting witness was face to face with him and had a full view of his face for approximately five to fifteen seconds; her assailant made her slide from the driver's seat to a position between the driver's seat and the front passenger's seat; her assailant then got into the driver's seat and she was in close proximity to him for approximately five minutes; while in the van she looked at the right side of his face for approximately five seconds and again looked at his face for approximately three seconds when a friend opened the door to the van; and the prosecuting witness's description of her assailant fit the general appearance of defendant.

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3. Criminal Law § 66.3— pretrial identification procedures—no impermissible suggestiveness—in-court identification of independent origin

There was no impermissible suggestiveness in either photographic display procedures or lineup procedures where the evidence tended to show that the victim was allowed to view a tray of photographs of various individuals at the police station within a few days after the incident, and the victim did not pick out anyone from this tray of photographs. Thereafter law enforcement officers gave a manila envelope containing eight photographs of individuals similar to defendant, and including the defendant, to the victim. After viewing the photographs, and without any suggestions or help from the police, the victim said that her assailant was either number five (defendant) or number six. Prior to viewing the photographs, the victim had seen an article in the newspaper, which contained a photograph of the defendant, stating that a suspect had been arrested in her case; however, the photograph was not similar in appearance to photograph number five, and the photograph in the newspaper was not a good photographic representation of the defendant's appearance as he appeared in a photographic lineup given to the victim. A few days later, the victim was asked to view a live lineup at the police station; the defendant, who was in custody in connection with another case, agreed to the live lineup and his attorney was present; the victim was in the room to view the lineup for approximately five minutes where she viewed the full facial view of the individuals in the lineup for some one and one-half minutes and she asked the police officer to have them turn so that she could see the right side of their face; instead of seeing the right side, she saw the left side and told the police officer that to the best of her knowledge, number two (defendant) was the man who had assaulted her. All six of the individuals in the live lineup were dressed alike, were approximately the same height and build, and had approximately the same length of hair and amount of facial hair.

4. Searches and Seizures § 47— assertion that search warrant invalid in that part included false statement by affiant—no challenge of "good faith"

The trial court properly denied defendant's motion to suppress the testimony identifying defendant's MGB as the vehicle the victim's assailant drove away in on the ground this evidence was obtained as the result of the seizure of his vehicle pursuant to an invalid search warrant where defense counsel conceded that defendant was not questioning the good faith of the affiant in including a questioned statement, but was seeking to attack the factual accuracy of the information provided. G.S. 15A-978(a) permits a defendant to challenge the validity of a search warrant by attacking the good faith of the affiant and providing information relied upon to establish probable cause, but it does not permit a defendant to attack factual accuracy of the information given in support of probable cause except on the ground that it was untruthful in the sense that it was not given in good faith.

5. Criminal Law § 105.1— waiver of his motion to dismiss by introducing evidence

By introducing evidence, defendant waived his motion to dismiss at the close of the State's evidence. G.S. 15-173; App. R. 10(b)(3).

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6. Criminal Law § 34.5— admission of evidence of independent criminal offense—admissible to show identity of defendant

The trial court properly admitted a witness's testimony concerning an offense committed upon her by defendant as substantive evidence of defendant's guilt where the similarity of the incidents experienced by the victim in this case and the witness provided the basis for a reasonable inference that the man who kidnapped and assaulted the witness was the same man who kidnapped and assaulted the victim in this case. However, the court erred in allowing into evidence the witness's testimony that defendant made her undress and threatened to commit a sexual offense upon her since that portion of testimony had no similarity to the incident perpetrated upon the victim in this case and did not tend to identify her assailant. Nonetheless, the error was non-prejudicial since defendant failed to demonstrate that the jury would likely have reached a different result if the court had properly excluded this portion of the testimony.

APPEAL by defendant from *Helms, Judge*. Judgment entered 18 August 1982, Superior Court, GASTON County. Heard in the Court of Appeals 1 December 1983.

In case number 82CRS2852 defendant was indicted and tried for first degree kidnapping and in case number 82CRS2853 defendant was indicted and tried for assault with a deadly weapon with intent to kill inflicting serious bodily injury. Defendant was convicted of second degree kidnapping and assault with a deadly weapon. He was sentenced to an active term of nine years for the kidnapping conviction and an active term of two years for the assault conviction to run consecutively to the nine year sentence. From said judgments, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Jay Stroud, for defendant appellant.

JOHNSON, Judge.

The State's evidence tended to show that on 4 February 1982 at about 9:05 p.m., Rhonda Faulkner left Eastridge Mall in Gastonia and got into her van which was parked at the main entrance to the mall. Her van failed to start and she reentered the mall and called Marion Metcalf, a friend, and requested that he come and help start her van. Approximately 25 minutes later, she returned to her van. As she got into her van, the defendant stepped between the door and the body of the van and prevented

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her from closing the door. Defendant then stated, "you don't know me, but I have a knife to your throat. Move over." Defendant directed her to get between the two bucket seats in the front of the van and advised her that he was being chased by the police and that she was going to take him to Cox Road near the Coachman Inn. Defendant asked her for the ignition key and as she reached in her bag, cut her hand with the knife. At this time Marion Metcalf arrived and approached the van. Defendant jumped out, ran, got into a 1970 white MGB with a black vinyl top and drove away. Defendant was in Ms. Faulkner's presence for approximately five minutes.

On 6 February 1982, Ms. Faulkner viewed a photographic lineup. She stated that her assailant was either number five or number six. Defendant was number five. On 9 February 1982, she picked defendant out of a lineup. Over defendant's objection, Ms. Faulkner was allowed to identify defendant as her assailant. Additionally, and over defendant's objection, Marion Metcalf was permitted to identify a photograph of defendant's 1970 MGB as the vehicle he saw Ms. Faulkner's assailant leave in. The State's evidence further tended to show that on 5 February 1982, Detective Crosby interviewed defendant. At that time, defendant stated that he owned a 1970 white MGB with a black vinyl top which he drove to Eastridge Mall in Gastonia at about 7:30 p.m. on 4 February 1982 and that he left the mall between 9:15 and 9:35 p.m.

Defendant's evidence tended to show that defendant is a member of the Army Reserve and has a very good character and reputation. In addition, on 4 February 1982 between 9:30 and 9:35 p.m., defendant was at the Lakeview Superette and was wearing blue jeans, a long sleeve plaid shirt and had a beard of one and one half inch in length. Defendant arrived home at about 9:50 p.m. On 6 February 1982, Ms. Faulkner described her assailant to the police as being 25 to 35 years of age, between 5'11" and 6'2" tall, medium to slender build, wearing a brown jacket and possibly white trousers, and had a two to three day's growth of hair on his face, with a reddish tinge in color.

In rebuttal, the State offered the testimony of Norma Cissell. She testified that on 22 December 1981 at about 9:00 p.m., she returned to her vehicle which was parked in front of Eastridge

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Mall after she had finished shopping. Cissell then testified, over defendant's objection, that as she got into her vehicle, defendant grabbed her, placed a knife to her throat and threatened to kill her if she screamed. Defendant forced his way into Cissell's car and told her he had robbed a bank and that the police were after him. Defendant then told Cissell that she was to give him a ride to Cox Road and forced her to drive him to the Coachman Inn. There, defendant forced her to undress and threatened to commit the crime of cunnilingus upon her. She managed to escape before any sexual act was committed.

[1] By his first assignment of error, defendant contends the court erred in prohibiting defense counsel from stating principles of law during his opening statement.

G.S. 15A-1221(a)(4) provides that in a criminal jury trial each party must be given the opportunity to make a brief opening statement. While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it. *See generally*, 23 A C.J.S., *Criminal Law*, § 1086 (1961). It should not be permitted to become an argument on the case or an instruction as to the law of the case. *Id.*

In the case *sub judice* the nature of defendant's defense was that of alibi. In his opening statement defense counsel sought to argue various principles of law applicable to the identification of an accused in a criminal action. The trial court properly limited counsel's opening statement to the nature of his defense and evidence he intended to offer to support it.

Defendant contends the trial court erred in the denial of his motion to suppress Ms. Faulkner's in-court identification of him.

Defendant urges two grounds for this assignment of error; first, that Ms. Faulkner's identification testimony was "inherently incredible" because of the physical conditions under which the "alleged" observations occurred and second, that the pretrial identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate defendant's right to due process of law. Pursuant to defendant's motion

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to suppress, the trial court conducted a *voir dire* hearing, after which it made finding of fact and concluded as a matter of law as follows:

The pretrial identification procedure involving the defendant was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate the defendant's rights to due process of law. Irrespective of this finding, based on clear and convincing evidence, the in-court identification of the defendant is of independent origin based solely on what the [Ms. Faulkner] saw at the time of the incident on February 4, 1982, and is not tainted by any pretrial identification procedure so unnecessarily suggestive or conducive to irreparable mistaken identification as to constitute a violation of due process of Law.

Defendant's First Theory

[2] With respect to defendant's first theory, ordinarily the question whether the testimony of the prosecuting witness, tending to identify the defendant as the perpetrator of the crime, has any probative force is exclusively a matter for jury determination. *State v. Guffey*, 265 N.C. 331, 144 S.E. 2d 14 (1965). However, this rule does not apply where the only evidence identifying the defendant as the perpetrator is "inherently incredible" because of undisputed facts clearly precluding a reasonable possibility of observation sufficient to permit subsequent identification. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967); *accord*, *State v. Guffey*, *supra*, and *Jones v. Schaffer*, 252 N.C. 368, 114 S.E. 2d 105 (1960). Defendant relies upon *Miller*, in which the Court reversed the defendant's conviction on the ground that the only evidence tending to identify defendant as one of the perpetrators of the crime was inherently incredible because of uncontradicted facts which precluded a reasonable possibility of observation sufficient to permit subsequent identification. *Miller* is distinguishable from the case at bar. In *Miller*, the identification witness was never closer than 286 feet to a man he saw running and who he was attempting to identify as the perpetrator of the crime. Also, the witness' description of the man differed from the defendant's actual appearance. It is apparent from Ms. Faulkner's testimony on *voir dire* that she had an opportunity to observe her assailant in the Eastridge Mall parking lot sufficient to permit a subsequent

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identification. On the night in question, there were lights along the front of the mall and in the mall's parking lot. Her van was parked about eight car lengths from the entrance of the mall and directly in front of a "very bright" light that illuminated the inside of her van. As her assailant stood in the doorway of the van, Ms. Faulkner was face to face with him and had a full view of his face for approximately five to fifteen seconds. Her assailant made her slide from the driver's seat to a position between the driver's seat and the front passenger's seat. Her assailant then got into the driver's seat and she was in close proximity to him for approximately five minutes. While in the van she looked at the right side of his face for approximately five seconds and again looked at his face for about three seconds when Marion Metcalf opened the door to the van. Ms. Faulkner's description of her assailant fit the general appearance of defendant. This evidence shows that the physical conditions of the situation were favorable for observation, and there is nothing inherently incredible about Ms. Faulkner's ability to make an observation under these circumstances. Defendant's contention on this point is, therefore, without merit.

Defendant's Second Theory

[3] Here, defendant contends the pretrial identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate defendant's right to due process of law.

The test under the due process clause as to pretrial identification procedure is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). The court employs a two-step process in evaluating such claims of denial of due process: (1) whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification; and (2) if so, whether, under the total circumstances, the suggestive procedures used gave rise to a substantial likelihood of irreparable misidentification. Only in the event that the first question is answered affirmatively is inquiry into the second question necessary. *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978).

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The trial judge made findings of fact consistent with the following evidence: Ms. Faulkner was allowed to view a tray of photographs of various individuals at the police station within a few days after February 4, 1982. Ms. Faulkner did not pick out anyone from this tray of photographs. Thereafter, law enforcement officers gave a manila envelope containing eight photographs of individuals, including the defendant, to Ms. Faulkner. Each of the eight persons in the photographs were approximately the same age, had the same hair length, and same amount of facial hair. None of the two or three police officers who were present when Ms. Faulkner viewed the photographs said anything to her except that she should view the photographs carefully. No police officer suggested, in any way, that she should pick out a particular photograph. After viewing the photographs, she said that her assailant was either number five (defendant) or number six. All of the eight photographs were of the same size and were similar photographs in that they all had full facial views of the left side of the subject's face. In addition, there was nothing in the eight photographs themselves that made one photograph stand out in comparison to all the other photographs.

Prior to viewing the photographs, Ms. Faulkner had seen an article in the newspaper, which contained a photograph of the defendant, stating that a suspect had been arrested in her case. That photograph was not similar in appearance to photograph number five which she thought may have been a photograph of her assailant. Also, the photograph shown in the newspaper was not a good photographic representation of the defendant's appearance as he appeared in the photographic lineup given to Ms. Faulkner or of the way he appeared in the photograph taken of the lineup which was later conducted. Ms. Faulkner stated that she had selected photographs five and six based on her observation made on the night of February 4, 1982, and not on the photograph which she had seen in the newspaper prior to the photographic identification procedure.

A few days later, she was asked to view a live lineup at the police station. Although she assumed that the suspect in her case would be in the lineup, she was not told that he would be. The defendant, who was in custody in connection with another case under an order of arrest, agreed to the live lineup and his attorney was present. Ms. Faulkner was told to take her time in

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viewing the live lineup through a glass mirror. She was in the room to view the lineup for approximately five minutes where she viewed a full facial view of the individuals in the lineup for some one and one-half minutes and she asked the police officer to have them turn so she could see the right side of their face, as that was the side of her assailant's face which she saw on the night of February 4, 1982. Instead of seeing the right side, she saw the left side and told the police officer that to the best of her knowledge, number two (defendant) was the man who had assaulted her. She told the officer that she was as positive as she could be that number two was the assailant and any hesitancy on her part was a result of the fact that the defendant would not look up during the live lineup procedure. The defendant was the only subject in the lineup who was also shown in the photographic lineup taken from the manila envelope. All six of the individuals in the live lineup were dressed alike, were approximately the same height and build, and had approximately the same length of hair and amount of facial hair. During the lineup, no police officer or anyone else suggested to Ms. Faulkner in any way that she should pick out any individual in the lineup as being the one who assaulted her on February 4, 1982. The trial judge also found as a fact that Ms. Faulkner's in-court identification of the defendant was of independent origin based solely on what the witness saw at the time of the incident on 4 February 1982.

We find no hint of impermissible suggestiveness in either the photographic display procedures or the lineup procedures employed here. Having found no impermissible suggestiveness in the procedures employed, we need not consider whether they resulted in substantial likelihood of irreparable misidentification. *State v. Headen, supra*. But even if we had found that the pretrial identification procedures involving defendant were impermissibly suggestive, defendant's contention is nonetheless without merit in light of sufficient *voir dire* evidence of record supporting the court's finding and conclusion that "the in-court identification of the defendant is of independent origin based solely on what the witness [Ms. Faulkner] saw at the time of the incident on February 4, 1982, and is not tainted by any pretrial identification procedure. . . ."

Defendant also contends that certain findings of fact made by the trial court are not supported by the evidence.

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It is an established rule that when a trial court's findings of fact are supported by competent evidence, they are binding on appeal. *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982). The evidence presented on *voir dire* clearly supports the court's findings. Hence, the court's findings are conclusive. Consequently, we find that the trial court correctly denied defendant's motion to suppress.

[4] By his next assignment of error, defendant contends the trial court erred in the denial of his motion to suppress Mr. Metcalf's testimony identifying photographs of defendant's MGB as being the automobile driven by Ms. Faulkner's assailant. Defendant contends this evidence was obtained as a result of the seizure of his vehicle pursuant to an invalid search warrant.

The ground upon which defendant contends the search warrant is invalid is that the affiant, in seeking the search warrant, included a false statement in the affidavit which was relied upon to establish probable cause. By this contention, defendant contests the validity of the search warrant and the admissibility of evidence obtained thereunder by challenging the "good faith" of the affiant in providing certain information relied upon to establish probable cause.

G.S. 15A-978(a)¹ permits a defendant to challenge the validity of a search warrant by attacking the good faith of the affiant in providing information relied upon to establish probable cause. It does not, however, permit a defendant to attack the factual accuracy of the information given in support of probable cause except on the ground that it was untruthful in the sense that it was not given in good faith. *State v. Winfrey*, 40 N.C. App. 266, 252 S.E. 2d 248, *disc. rev. denied*, 297 N.C. 304, 254 S.E. 2d 922 (1979). A defendant challenging the validity of a search warrant under G.S. 15A-978(a) has the burden of showing by a preponderance of the evidence first, that the affiant acted in bad faith or acted with a reckless disregard for the truth in including a false statement in

1. G.S. 15A-978(a) states that: A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

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the warrant affidavit, and second, that the false statement was necessary to the finding of probable cause. *State v. Winfrey, supra*.

In the case *sub judice* the facts of the affidavit used to establish probable cause are stated as follows:

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: To sieze (sic) a 1970 MGB Serial #GHN5UA216979G North Carolina Tag RFX717 1982 Tag owned by Edwin Laverne Elliott and registered to Edwin Laverne Elliott for the purpose of photographs of the exterior surfaces and interior surfaces for purpose of identification by witness to the crime of 1st Degree kidnapping and A.W.D.W. which happened at the Eastridge Mall in Gastonia, N.C. on Feb. 4, 1982 in which Marion Metcalf was witness to, in which the victim of the above crime was Rhonda Faulkner. Marion Metcalf described the person who committed the above crime as fleeing the scene of the crime in the above described vehicle. Marion Metcalf has described the above vehicle to Sgt. D.C. Crosby and Sgt. D.C. Crosby has observed the vehicle to be the same as the vehicle described by Marion Metcalf. Edwin Laverne Elliott has been charged with the crime of 1st Degree Kidnapping and A.W.D.W. of Rhonda Faulkner.

Defendant argues first that the statement "Marion Metcalf described the person who committed the above crime as fleeing the scene of the crime in the above described vehicle," is a false statement in that a reasonable inference from this statement is that Mr. Metcalf, either at the scene of the crime or some later date, noted that the vehicle was a 1970 model, obtained the license tag and serial numbers of the vehicle and informed the police of this information; when in fact Mr. Metcalf never acquired this information. Second, that the affiant, although knowing this statement to be false, knowingly and intentionally included it in the warrant affidavit to establish probable cause. And third, that this false statement was necessary to the finding of probable cause.

An examination of the record reveals that at the trial level, defendant did not raise the issue of the "good faith" of the affiant

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in providing certain information in the affidavit. The following *voir dire* statement bears this out.

MR. STROUD: What I'm saying in return is the affidavit does not truthfully show—I'm not saying they [the affiants] were trying to be dishonest. All I'm saying is that the affidavit does not truthfully show the true information available to the police at the time they applied for the affidavit and gave this information to the magistrate in this form, and it does not accurately show, and therefore it was not properly issued, because information that was given to the magistrate was not correct, and that's what I want to ask him about, to establish that he did not see the tag number . . . (emphasis added).

The statement of defense counsel clearly shows that defendant was not questioning the good faith of the affiant in including the questioned statement in the affidavit, but was seeking to attack the factual accuracy of the information provided. Defense counsel's statement that he was not saying the affiants were trying to be dishonest must be considered equivalent to a concession that the affiant did not act in bad faith in including the information in the affidavit. In light of this concession and the fact that all of defense counsel's questions on *voir dire* were directed toward showing that the affidavit contained false information as opposed to seeking to disclose any bad faith on the part of the affiant, we hold that the trial court properly denied defendant's motion to suppress the testimony identifying defendant's MGB as the vehicle Ms. Faulkner's assailant drove away in.

[5] Defendant assigns error to the denial of his motion to dismiss at the close of the State's evidence. Defendant presented evidence following the denial of his motion and renewed his motion to dismiss at the close of all the evidence. The court also denied his renewed motion. By introducing evidence, defendant waives his motion to dismiss at the close of the State's evidence. G.S. 15-173; App. R. 10(b)(3). Defendant does not assign error to the denial of his motion to dismiss at the close of all the evidence and, thus, has not presented its denial for review on appeal. App. R. 10(a).

[6] Defendant also assigns as error the admission of Norma Cissell's testimony on rebuttal which tended to show defendant to be guilty of an independent criminal offense.

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As stated in *State v. Freeman*, 303 N.C. 299, 301-302, 278 S.E. 2d 207, 208 (1981):

"The general rule is that '[e]vidence of other offenses is inadmissible on the issue of guilt if its only relevance is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant act it will not be excluded merely because it also shows him to have been guilty of an independent crime.'" 1 Stansbury's North Carolina Evidence, § 91, pp. 289-290 (Brandis rev. 1973); *State v. Keller*, 297 N.C. 674, 679, 256 S.E. 2d 710, 714 (1979). If consequently, the evidence tends to identify the accused as the perpetrator of the crime charged it is admissible notwithstanding that it also shows defendant to be guilty of another criminal offense. "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same persons, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 367 (1954); accord, *State v. Perry*, 275 N.C. 565, 571, 169 S.E. 2d 839, 843 (1969).

In *Freeman*, *supra*, the court held that although the victim, Ms. Whitman, had positively identified defendant as her assailant, the defendant's evidence tending to establish an alibi "made the question of whether defendant was, indeed, the perpetrator the very heart of the case"; consequently, the State was entitled, in rebuttal, to offer evidence probative of the identity question. 303 N.C. at 302, 278 S.E. 2d at 208-209. The *Freeman* court affirmed the trial court's ruling in allowing the State, in rebuttal, to introduce evidence of another crime which tended to identify defendant as the perpetrator of the crime against Ms. Whitman. Similarly, in the case *sub judice*, although Ms. Faulkner positively identified defendant as her assailant, the defendant's evidence tending to establish an alibi made the question of whether defendant was, indeed, the perpetrator the central issue of the case, thereby, entitling the State, in rebuttal, to offer evidence probative of this question.

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Ms. Faulkner testified that on 4 February 1982 at about 9:30 p.m., as she entered her vehicle parked in front of Eastridge Mall, her assailant placed a knife to her throat and forced his way into her vehicle. Her assailant told her that he was being chased by the police and that she was going to take him to Cox Road near the Coachman Inn. Ms. Cissell testified that on 22 December 1981 at about 9:00 p.m., as she entered her vehicle parked in front of Eastridge Mall, defendant placed a knife to her throat, forced his way into her vehicle, told her that the police were after him and that she was going to give him a ride to Cox Road. Defendant forced her to drive to the Coachman Inn where he forced her to undress and threatened to commit cunnilingus upon her.

Except for Ms. Cissell's testimony that the defendant forced her to undress and threatened to commit a sexual offense upon her, Ms. Cissell's testimony did tend to identify defendant as the perpetrator of the crimes against Ms. Faulkner. The court properly admitted Ms. Cissell's testimony as substantive evidence of defendant's guilt. The similarity of the incidents experienced by both Ms. Faulkner and Ms. Cissell provides the basis for a reasonable inference that the man who kidnapped and assaulted Ms. Cissell was the same man who kidnapped and assaulted Ms. Faulkner. However, the court erred in allowing into evidence Ms. Cissell's testimony that defendant made her undress and threatened to commit a sexual offense upon her. This portion of Ms. Cissell's testimony has no similarity to the incident perpetrated upon Ms. Faulkner and does not tend to identify her assailant. Nonetheless, we hold that the error was nonprejudicial. The defendant has failed to demonstrate that the jury would likely have reached a different result if the court had properly excluded this portion of the testimony.

We have carefully examined defendant's remaining assignments of error and find them to be without merit.

In the trial of defendant's case we find no prejudicial error.

No error.

Judges ARNOLD and PHILLIPS concur.

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MATTIE (FLOSSIE) W. WARREN, ADMRX., CTA OF THE ESTATE OF T. JACK WARREN, DECEASED, AND HAROLD L. WATSON, T/A FARMERS WAREHOUSE v. GUTTANIT, INC.

No. 823SC971

(Filed 19 June 1984)

1. Uniform Commercial Code § 14— express and implied warranties as to fitness of roofing materials—properly found

A trial court properly found and concluded that defendant expressly and impliedly warranted the fitness of its roofing materials and breached the warranties so made. Further, the trial court's findings of fact, that although defendant's materials were represented as being ideal for protecting plaintiff's building against rainfall, they were not suitable for that purpose, were also amply supported by competent evidence even though there was some evidence that an employee of defendant disclaimed the warranties. G.S. 25-2-313 and G.S. 25-2-316.

2. Uniform Commercial Code § 24— revocation of acceptance properly found

A trial court properly found that plaintiffs revoked the acceptance of roofing materials where the evidence tended to show that plaintiffs were justified in undertaking to revoke their acceptance in that the roof covering provided by defendant did not keep the rain out of plaintiffs' tobacco warehouse, and where the plaintiffs made many justifiable complaints about the leaking roof's defects which defendant recognized by repeatedly trying to rectify them over a period of several months. Formal notice that acceptance was being revoked was not necessary since any conduct by the buyer manifesting to the seller that he is seriously dissatisfied with the goods and expects redress or satisfaction is sufficient. The change that occurred in the roofing materials was inherent in the agreement made, and the court found that the defect was not in the installation, but in the materials themselves. G.S. 25-2-608(2). Finally, under the circumstances revealed by the record, the delays that occurred in bringing this matter to suit were entirely reasonable. G.S. 25-2-608(1)(a) and (b), G.S. 25-2-711(1), and G.S. 25-2-607(4).

3. Uniform Commercial Code § 26— measure of damages for breach of warranty incorrectly applied

The trial court erred in limiting plaintiffs' damages in an action alleging breach of express and implied warranties for roofing materials to the provisions of G.S. 25-2-711 and G.S. 25-2-713. G.S. 25-2-714(2) authorized damages of \$81,067.50, which was the difference in value between the materials as warranted and the materials as delivered. G.S. 25-2-714(1) and G.S. 25-2-711, 712, and 715 entitled the plaintiffs to recover the amount paid to the contractor for installing the roofing materials as well as the amount paid by plaintiffs in attempting to repair the defective roof. The amount expended by plaintiffs in having the roofing materials inspected and tested were authorized by G.S. 25-2-711(3), and as "incidental" damages, they were authorized by G.S. 25-2-715(1).

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4. Unfair Competition § 1— finding of no unfair and deceptive trade practice proper

The trial court properly dismissed plaintiffs' claim that in selling its roofing materials to plaintiffs, defendant engaged in an unfair and deceptive trade practice since breach of warranty alone is not a violation of Chapter 75 of the General Statutes, and since the facts found by the trial judge did not tend to establish allegations that defendant's agents' representations were fraudulently made.

APPEAL by both the plaintiffs and defendant from *Smith, Judge*. Judgment entered 23 July 1982 in Superior Court, PITT County. Heard in the Court of Appeals 23 August 1983.

Sometime before April 23, 1980, plaintiffs, who owned a tobacco warehouse that needed re-roofing, observed an exhibit of defendant's roofing materials and were furnished with defendant's brochure, which stated: "Simply translated, GUTTANIT means 'not a drop of water' or 'weather proof.' GUTTANIT is our brand of corrugated asphalt roofing and siding that has our 25 year warranty against leakage and backs it up." Upon plaintiffs' show of interest in defendant's materials, defendant's Vice President in charge of sales represented to plaintiffs that Guttanit's roofing materials were "suitable" and "ideal" for such a project. Before the sale was made, defendant's agents looked at the roof and told plaintiffs that because of its large size and very gentle slope defendant would not give plaintiffs the warranties and guarantees expressed in the brochure unless the materials were installed by Garry Phillips.

On April 23, 1980, plaintiffs and defendant entered into a contract under which for \$81,067.50 defendant agreed to supply plaintiffs with corrugated asphalt roofing sheets and other materials for installation on their roof by Garry Phillips. Since it was a cash transaction, however, a discount was allowed and the amount plaintiffs paid was \$79,446.15. Phillips did the roofing job in accord with defendant's instructions and he was paid \$25,000 therefor by plaintiffs.

The new roof began to leak during construction and continued to leak until completion June 18, 1980 and thereafter, despite various measures taken first by Garry Phillips, then by defendant, and finally by plaintiffs. Between August 24 and November 4, 1980 plaintiffs expended \$29,628.60 for that purpose,

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with only partial success, however, as the roof continued to leak, though not quite as profusely. Earlier, during the period when attempts to correct the leaking were being made, defendant sold plaintiffs additional roofing materials priced at \$7,011, which plaintiffs have not paid.

On February 3, 1981, defendant's Chairman of the Board personally examined the roof and told plaintiffs it was either too flat or the wrong shape. Several days later, however, he claimed by letter that the roofing materials were installed improperly and that because of that and the slight slope of the roof, which did not allow water to run off properly, the roof could not be made leak-free.

Plaintiffs sued defendant on March 9, 1981, alleging four different claims. The first claim was based on a revocation of acceptance theory and alleged a breach of defendant's express 25 year warranty, as well as an express warranty of fitness for a particular purpose. The second claim, also based on a revocation of acceptance theory, alleged a breach of an implied warranty of fitness for a particular purpose. The third claim, though alleging a breach of the two express warranties stated in the first claim, was based on an acceptance theory, as opposed to revocation of acceptance. The fourth claim, also based on an acceptance theory, alleged again the breach of an implied warranty of fitness for a particular purpose. In its answer, defendant denied all the alleged breaches and counterclaimed for the price of the additional roofing materials later sold to plaintiffs.

Thereafter, plaintiffs paid \$8,656.03 for inspections and tests to determine whether the leaking was due to improper installation, as defendant claimed, or because the roofing materials were defective or unsuitable, as plaintiffs claimed, and amended their complaint accordingly. Plaintiffs were also permitted to add a fifth claim for treble damages based on the alleged unfair trade practice of selling the unsuitable roofing materials to them. Apart from the sums expended in putting the roof on and attempting to repair the leaks, plaintiffs claimed as damages \$220,553.85, the alleged cost of putting the roof in the condition it would have been had defendant properly performed its contract.

The case was tried without a jury and at the close of plaintiffs' evidence, pursuant to Rule 41(b) of the Rules of Civil Pro-

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cedure, defendant moved for a directed verdict as to each of plaintiffs' five claims, and the motion was allowed as to the third, fourth, and fifth claims. The third and fourth claims were dismissed upon findings and conclusions that plaintiffs presented no evidence that they had notified defendant in writing of the breach of express warranty alleged in the third claim and the breach of implied warranty alleged in the fourth claim; the judge also concluded in regard to these claims that by not presenting evidence that defendant was notified in writing of the breaches of warranty that plaintiffs had elected to proceed under their first and second claims based on revocation of acceptance. In dismissing the fifth claim, it was ruled as a matter of law that no unfair or deceptive practices affecting commerce had been shown.

At the close of all evidence, the trial judge made findings of fact substantially in accord with the facts stated above, and also found that: The materials were properly installed by Garry Phillips; defendant's asphalt shingles were not suitable for plaintiffs' roof because its slope was only one-half inch per twelve inches; the roofing materials could not be removed without damaging both the original roof and defendant's newly-affixed materials and if the materials were removed from plaintiffs' roof, they would have no value whatsoever.

The trial court concluded, in substance, that (1) defendant breached its express and implied warranties of fitness for a particular purpose, as well as its express warranty against leakage made on the condition that Garry Phillips do the roofing job; (2) merely installing the roofing materials substantially changed them; and (3) within a reasonable time after the roofing materials were installed plaintiffs revoked their acceptance of the defective materials.

Ruling that plaintiffs' damages were controlled by G.S. 25-2-711 and 25-2-713 of the Uniform Commercial Code, the judge awarded them damages for the \$79,446.15 actually paid for the defective materials and the \$25,000 paid Garry Phillips for installing the materials. But he ruled that the sums expended unsuccessfully trying to remedy the defective roof and in inspecting and testing the materials were not recoverable. Defendant's counterclaim was dismissed. Both parties appealed.

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James, Hite, Cavendish & Blount, by M. E. Cavendish and Charles R. Hardee, for plaintiff appellants/appellees.

Gaylord, Singleton, McNally & Strickland, by Danny D. McNally, for defendant appellee/appellant.

PHILLIPS, Judge.

The appeals of one party or the other, or both, present the following questions for our determination:

- (1) Did the trial court err in concluding that defendant breached its express and implied warranties as to the fitness of its materials for plaintiffs' roof and its express warranty made on condition that Garry Phillips install the materials?
- (2) Did the court err in concluding that plaintiffs adequately revoked their acceptance of the roofing materials?
- (3) If the acceptance was properly revoked, did the trial court apply the correct measure of damages?
- (4) Did the court err in ruling that defendant was not entitled to recover on its counterclaim?
- (5) Did the trial court err in concluding as a matter of law that defendant's acts and practices did not amount to "deceptive trade practices" under Chapter 75 of the General Statutes?

We approach these questions from the following base, to which we will return as need requires: Trial by jury having been waived, determining the credibility of the witnesses and weighing their evidence was the duty and prerogative of the trial judge, and his findings of fact, if supported by competent evidence, are binding. *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). Since the judge's finding that defendant's materials were not suitable for roofing plaintiffs' warehouse is abundantly supported by evidence, the rights and duties of the parties no longer depend upon the character of the materials, which has been set at rest, but upon what the parties either said or did about the materials on the different occasions involved and the effect of such deeds and words under Chapter 25 of the General Statutes, otherwise known as the Uniform Commercial Code.

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I**THE WARRANTIES AND THEIR BREACH**

[1] That the trial judge did not err in finding and concluding that the defendant expressly and impliedly warranted the fitness of its roofing materials and breached the warranties so made requires no demonstration. The trial court's findings of fact that though defendant's materials were represented as being ideal for protecting plaintiffs' building against rainfall, they were not suitable for that purpose, are amply supported by competent evidence. G.S. 25-2-313, in pertinent part, states that: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." That this provision applied to the affirmations of defendant's Vice President that the materials were ideal for the roof of plaintiffs' warehouse cannot be gainsaid, and defendant does not attempt to do so; instead, it contends that the warranties were effectively disclaimed, as G.S. 25-2-316 permits under certain conditions, by one of its employees telling plaintiffs that the 25-year warranty would not be given because the roof was too flat. But this employee's statement was totally inconsistent with the unqualified representations of suitability made by his superior, defendant's Vice President, and that the trier of fact attached more weight to the statement of the latter than he did to the former is understandable. Thus, the judgment of the trial court in this regard is affirmed and the defendant's contentions of error are overruled.

II**REVOCATION OF ACCEPTANCE**

[2] Since it has been established that defendant breached the express and implied warranties made as to the fitness of its roofing materials, whether plaintiffs preserved their right to damages by properly revoking their earlier acceptance of the materials, manifested by their permitting the materials to be put on their building, is crucial to the case. Because unless their acceptance of the goods was justifiably revoked as G.S. 25-2-711(1) requires, their recovery in the trial court cannot be upheld. The burden of showing this was on the plaintiffs. G.S. 25-2-607(4). In meeting

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that burden, as was ruled in *Harrington Manufacturing Co., Inc. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E. 2d 282, *rev. denied*, 297 N.C. 454, 256 S.E. 2d 806 (1979) and *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972), plaintiffs were obliged to prove the following:

- (1) Because the goods did not conform to the contract their value to them was substantially impaired. G.S. 25-2-608(1).
- (2) They either accepted the goods knowing they did not conform, but reasonably assumed that the defects would be cured, G.S. 25-2-608(1)(a), or they accepted the goods without discovering that they did not conform either because discovery before then was difficult or by defendant's assurances that the goods did conform. G.S. 25-2-608(1)(b).
- (3) They revoked their acceptance within a reasonable time after they discovered or should have discovered the defect, and notified defendant thereof. G.S. 25-2-608(2).

That the first two requisites were proved and plaintiffs were justified in undertaking to revoke their acceptance is self-evident from the record and the nature of things. Roof covering that does not keep out the rain and cannot be corrected, as the court found, has little or no value to anyone that needs a rainproof roof, as plaintiffs did; and the inability of the materials to keep out the rain could hardly have been known to plaintiff before they were affixed to the roof and the first rainfall occurred. But the defendant's several objections to the other requisite, though all are specious, require more discussion.

First, defendant contends that plaintiffs did not revoke their acceptance of the goods. But the many justifiable complaints that plaintiffs made about the leaking roof's defects, the validity of which defendant recognized by repeatedly trying to rectify them over a period of several months, could hardly be construed otherwise, and the court's conclusion that acceptance was revoked is affirmed. Formal notice that acceptance is being revoked is not necessary; any conduct by the buyer manifesting to the seller that he is seriously dissatisfied with the goods and expects redress or satisfaction is sufficient. In *Performance Motors, Inc. v. Allen*, *supra*, constant complaints for more than three months,

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coupled with a cessation of payments, were held to constitute a sufficient revocation of acceptance by the buyer and sufficient notice thereof to the seller. Furthermore, in this instance, within a month after plaintiffs' last complaint and defendant's acknowledgment that the roof could not be rendered leakable, any uncertainty that defendant may have had about plaintiffs revoking their acceptance was dispelled by the filing of this action. Another contention is that under G.S. 25-2-608(2), plaintiffs could not revoke their acceptance because there was a substantial change in the goods before revocation was attempted. The change that occurred, however, due to nailing the corrugated asphalt shingles onto plaintiffs' roof and applying caulking compound to them, was inherent in the agreement made; which was not just for the purchase of roofing materials, but for materials that were going to be affixed to plaintiffs' roof by Garry Phillips under the defendant's supervision. Furthermore, G.S. 25-2-608(2), as its terms expressly provide, does not apply to goods that are defective *before* a change occurs, as was the case here; the court's uncontested finding being that the defect was not in the installation, but in the materials.

Finally, defendant contends that plaintiffs' revocation was not timely made. What is a reasonable time within which to revoke an acceptance—like most other questions that involve the reasonable man and his myriad activities—depends on the circumstances of the case and is ordinarily a question of fact for the jury or other fact finder. *Harrington Manufacturing Co., Inc. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E. 2d 282 (1979). Under the circumstances revealed by the record, the delays that occurred in bringing this matter to a head were entirely reasonable in our opinion and the court's conclusion with respect thereto is affirmed. From June, 1980, when the first leak occurred, until February 9, 1981, when defendant's Chairman of the Board admitted that nothing further could be done and the roof would continue to leak, efforts were repeatedly made by defendant to repair it and plaintiff was assured on several different occasions by Garry Phillips, the roofing contractor, and defendant's repairmen that the corrective measures attempted would be successful and the leaks would be eliminated. Obviously, it was in defendant's interest for the roof to be made sound, even if it took several months; and a revocation by plaintiffs when the first leak

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occurred, followed by a demand for the return of the purchase money and other damages, if not premature and unwarranted, would certainly have been contrary to the usual practice in such matters. That defendant was accorded the opportunity to rectify the defects and was unable to do so during the several months involved is no proper base upon which to mount a defense. Delays much longer than that evidenced here have been deemed justifiable for similar reasons. See *Gramling v. Baltz*, 253 Ark. 352, 485 S.W. 2d 183 (1972); *Uganski v. Little Giant Crane & Shovel, Inc.*, 35 Mich. App. 88, 192 N.W. 2d 580 (1971).

III

DAMAGES

[3] The court ruled that the measure of damages to be awarded plaintiffs is governed by the provisions of G.S. 25-2-711 and G.S. 25-2-713. This ruling is not correct. G.S. 25-2-713 has no application to the case, since its very terms limit its application to situations where a seller has repudiated the contract by failing to deliver the goods, and the record shows without conflict that defendant's roofing materials were both delivered and accepted. In listing the statutes deemed to be controlling, G.S. 25-2-713 may have been inadvertently substituted for G.S. 25-2-712. In all events, the parts of G.S. 25-2-711 which set forth the buyer's remedies *in general* when the acceptance of nonconforming goods has been justifiably revoked and certain portions of G.S. 25-2-712 do apply to plaintiffs' damages, but they do not necessarily *govern* their measure, since other portions of the Uniform Commercial Code also apply to the situation recorded. G.S. 25-2-711(1) entitles plaintiffs to recover "so much of the price as has been paid" for the defective materials, "have damages under the next section [G.S. 25-2-712]," and recover "any expenses reasonably incurred in . . . [the] inspection, receipt, transportation, care and custody" of the materials. And G.S. 25-2-712 entitles plaintiffs to "incidental or consequential damages" in accord with G.S. 25-2-715, though no "cover" was made or attempted. But since express and implied warranties were made and breached, G.S. 25-2-714 and G.S. 25-2-715 also affect the damages that plaintiffs are entitled to recover. These statutes provide as follows:

§ 25-2-714. Buyer's damages for breach in regard to accepted goods.—(1) Where the buyer has accepted goods and

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given notification (subsection (3) of § 25-2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section [§ 25-2-715] may also be recovered.

§ 25-2-715. Buyer's incidental and consequential damages.—(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Thus, the problem, simply put, is whether one or more of these statutes authorized plaintiffs' recovery of the damages that were awarded—the amount paid for the materials and the cost of installing them on the roof—and the damages that were disallowed—the stated price of the materials in lieu of the amount actually paid, and the amounts spent in having the materials tested and in trying to stop the leaks. For, as was pointed out in *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 395-396, 186 S.E. 2d 161, 167 (1972), “[a] buyer who so revokes his acceptance is no

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longer required to elect between revocation of acceptance on the one hand and recovery of damages for breach of implied warranty of fitness on the other," but now may recover "'so much of the [purchase] price as has been paid' plus any incidental and consequential damages . . . [he] is able to prove." The damages authorized by these several statutory provisions that plaintiffs were able to prove, and did prove, in our opinion, were as follows:

DAMAGES DUE PLAINTIFFS

- (1) \$81,067.50, which is the difference in value between the materials as warranted and as delivered. Those damages were authorized by G.S. 25-2-714(2) and were proved by the court's findings that the agreed and established price of the materials was \$81,067.50 and that the materials when installed on plaintiffs' roof had no value at all. Evidence that the price of the materials was \$81,067.50 is strong proof that they were worth that amount when in the condition represented. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E. 2d 277 (1979). That plaintiffs did not pay this amount, but \$79,446.15 because of the discount granted for paying cash, is not controlling. The difference in value measure has as much statutory sanction as the amount paid measure, and when warranties have been breached the law's policy is to enforce a full, rather than a restricted, recovery. Thus, the court's conclusion that plaintiffs' recovery on this score was limited to the amount paid was erroneous and upon remand the judgment will be modified accordingly. This award, plainly required by statute, is also in accord with, rather than contrary to, equity, it seems to us. The \$1,621.35 difference between the contract price and the amount paid was due to plaintiffs paying defendant in advance and any benefit resulting therefrom rightfully belongs to the plaintiffs, who paid for it, rather than defendant, who did not and has had the use of plaintiffs' money ever since. Nor is our holding contrary to the "so much of the price as has been paid" statement in *Performance Motors, Inc. v. Allen*, *supra*. For in that case only about a third of the price had been paid and the difference in value measure of G.S. 25-2-714 clearly was not applicable; whereas, in this case the plaintiffs fully paid

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for the goods at the outset and the difference in value measure authorized by the statute was clearly the applicable measure, since plaintiffs chose to rely on it.

- (2) \$25,000, the amount plaintiffs paid to the contractor, Garry Phillips, for installing the roofing materials. These damages were proved by the court's uncontested finding that the agreement of the parties was contingent upon the materials being installed by Garry Phillips and that plaintiffs paid him \$25,000 therefor. As a "loss resulting in the ordinary course of events from the seller's breach," their recovery was authorized by G.S. 25-2-714(1) and as "incidental or consequential damages," they were authorized jointly by G.S. 25-2-711, 712, 714 and 715. Thus, the trial court's award of these damages to plaintiffs is affirmed.
- (3) \$29,628.60, the amount paid out by plaintiffs in attempting to repair the defective roof. These damages were proved by the unexcepted findings that the roof leaked and plaintiffs reasonably expended this amount in attempting to eliminate the leaks, and were authorized by the same statutory provisions referred to in the preceding paragraph. Thus, the denial of these damages to the plaintiffs was error and upon remand the judgment will be modified accordingly.
- (4) \$8,656.03, the amount expended by plaintiffs in having the roofing materials inspected and tested by Law Engineering Testing Company, Inc. As expenses reasonably incurred in inspection of the goods they were authorized by G.S. 25-2-711(3), and as "incidental" damages they were authorized by G.S. 25-2-715(1). These damages were proved and are recoverable even though the court concluded as a matter of law that the inspection was made solely for the purposes of this litigation. If this conclusion had adequate support in the findings of fact, we would be bound by it, since expenses incurred solely for the purposes of litigation are generally not recoverable as damages either in contract or tort. *Perkins v. American Mutual Fire Insurance Co.*, 4 N.C. App. 466, 167 S.E. 2d 93 (1969). But the court's pertinent finding of fact was that

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this amount was expended "to analyze the leaking condition of their warehouse roof with respect to whether or not plaintiffs' warehouse roof was leaking as a result of improper installation as claimed by defendant or due to a defect in the roofing materials or the unsuitability of said roofing materials for plaintiffs' warehouse roof." That the tests made of the materials have been helpful to plaintiffs in the litigation does not alter the facts that the cost of inspections and tests to determine the nature or extent of the goods' defects is clearly recoverable as incidental damages under G.S. 25-2-715(1), and the inspection of the materials was clearly both reasonable and necessary. Before plaintiffs could sensibly determine what to do about their leaking roof, it was necessary to ascertain whether the roof leaked because of the shoddy composition of the materials or because of faulty installation. Therefore, the court's conclusion that these damages are not recoverable is reversed and upon remand the judgment must be modified accordingly.

Thus, the amount the plaintiffs are entitled to recover of the defendant is \$144,352.13, itemized above, rather than \$100,515.40, as provided in the judgment appealed from; and upon remand the judgment will be modified accordingly.

IV**DEFENDANT'S COUNTERCLAIM**

Defendant contends that if plaintiffs justifiably revoked their acceptance of the defective roofing materials, it necessarily follows that it is entitled to an offset of \$7,011 for additional roofing materials furnished plaintiffs, which they have not paid for. We disagree. Any vitality that defendant's counterclaim had was snuffed out by the finding of fact, supported by competent evidence, that defendant's Vice President, Gagnon, after concluding that the leaks in the roof could not be eliminated, refused to accept payment of the \$7,011 and said that the cost of those replacement materials would be included in what plaintiffs paid for at the beginning. The court's conclusion that the counterclaim is without merit necessarily followed therefrom.

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V**PLAINTIFFS' CLAIM FOR UNFAIR
AND DECEPTIVE TRADE PRACTICES**

[4] We find no error in the court's involuntary dismissal of plaintiffs' fifth claim that in selling its roofing materials to plaintiffs, defendants violated Chapter 75 of the General Statutes, otherwise known as Unfair and Deceptive Trade Practices Act. Breach of warranty alone is not a violation of Chapter 75. *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E. 2d 801, *rev. denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978). The thrust of plaintiffs' claim was that the representations of defendant's agents concerning its products were fraudulently made, but the facts found by the trial judge do not tend to establish those allegations.

As to defendant's appeal, affirmed.

As to plaintiffs' appeal, affirmed in part; reversed in part; and remanded for entry of judgment in accordance with this opinion.

Judges HEDRICK and WELLS concur.

ANTHONY E. STEPHENSON v. THOMAS L. JONES AND WIFE, PAULA H. JONES, AND COLEMAN R. FELTON AND WIFE, MARY K. FELTON

No. 836SC744

(Filed 19 June 1984)

1. Appeal and Error § 42— summary judgment— omission of matters from record on appeal— presumption

Where the trial court considered a docket sheet and court file in another case in granting summary judgment for defendants, but plaintiff appellant failed to place the docket sheet or the court file in the record on appeal, it will be presumed as a matter of law that nothing in the file aids the plaintiff or reveals any genuine issue for the jury's determination.

2. Registration § 1— unrecorded deeds or contracts to convey— effect of Connor Act

The Connor Act, G.S. 47-18, does not favor persons withholding from the public record deeds or contracts to convey or reconvey lands, particularly when third parties have given valuable consideration for the lands.

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3. Registration § 5.1— vendees of land—no notice of facts affecting legal title

Vendees' purchase of land from an attorney and his wife was without notice of any facts which would affect legal title where no *lis pendens* was pled or proved, and where an affidavit of the purported owner failed to show that pending litigation, of which he gave the vendees oral notice, affected record title to the property.

4. Registration § 5.1— vendees of property—no notice of unrecorded oral promise by vendors to reconvey—innocent purchasers for value

Vendees who bought a farm from an attorney and his wife were the lawful owners thereof free and clear of any claims of plaintiff purported owner, who claimed a better right to the farm pursuant to an alleged unrecorded oral promise by the attorney and his wife to reconvey the farm to him once a lawsuit with his wife was settled, where the evidence showed that the vendees were innocent purchasers for value in that they paid a valuable consideration and they were on notice that the attorney and his wife held legal title to the farm, that the vendees could deal with the attorney and his wife independently of the purported owner, and that the purported owner desired that the farm be sold and believed that the sale would protect his interests, and where the purported owner's affidavit failed to allege facts which would constitute a parol trust from the attorney and his wife to reconvey the property directly to him.

APPEAL by plaintiff from *Barefoot, Judge*. Judgment entered 19 March 1983 in the Superior Court, HERTFORD County. Heard in the Court of Appeals 30 April 1984.

Rosbon D. B. Whedbee for plaintiff appellant.

Baker, Jenkins & Jones by Ronald G. Baker and W. Hugh Jones, Jr., for additional defendant appellees.

BRASWELL, Judge.

The defendants Coleman R. Felton and his wife, Mary K. Felton, bought the "Old Betty Stephenson Farm" by warranty deed on 3 January 1983 from the defendants Thomas L. Jones and his wife, Paula H. Jones. Were the Feltons bona fide purchasers for value? The plaintiff Stephenson claimed a better right to the same farm due to an alleged oral promise made by the defendants Jones to reconvey the property to him, and filed this lawsuit on 18 January 1983, asking for "equitable relief, in the nature of a rescission of the referenced Deed." The Feltons filed their Answer and Counterclaim on 18 February 1983 denying the plaintiff's claim and raising the further defenses that the complaint failed to state a claim, according to Rule 12(b)(6), and that any such claim

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was barred by the Statute of Frauds pursuant to G.S. 22-2 and the Connor Act, as found in G.S. 47-18 and G.S. 47-20.

Simultaneously with their answer, the Feltons moved for judgment on the pleadings. After a hearing on 14 March 1983 the court gave judgment to the Feltons and declared them to be the lawful owners of the farm free and clear of any and all claims of the plaintiff, and ordered Stephenson to vacate the premises. The plaintiff appeals.

It must be kept in mind that the defendants Jones are not parties to this appeal. The plaintiff's claim against the Joneses is yet to be heard or determined on the merits or through motions in the trial division. While technically this appeal might be considered interlocutory and dismissible because the rights of fewer than all parties and fewer than all claims have been resolved, we nevertheless consider this appeal as though it had been allowed under certiorari because a decision determining the plaintiff's claim against the Feltons is independently decisive of whether or not the plaintiff can ever have the house and land reconveyed in kind to him. If the Feltons are bona fide purchasers for value, they should not have to wait for relief until the separate claims and rights between Stephenson and the Joneses are settled. No just reason would here be served by allowing further procedural delay. G.S. 1A-1, Rule 54, Rules of Civil Procedure; G.S. 1-277.

The sole issue raised by the plaintiff Stephenson is whether the trial court erred by granting judgment on the pleadings to the Feltons. We must, however, treat the appeal as one involving the principles of summary judgment because the record reveals that at the hearing the parties offered evidence.

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . . G.S. 1A-1, Rule 12(c), Rules of Civil Procedure.

[1] The face of the judgment shows that the hearing was pursuant to Rule 12(c) and that the court considered "the pleadings in the case, the Affidavit of the Plaintiff, the Consent Judgment and Superior Court Docket Sheet in Hertford County Court File 80CVD367, and the arguments of Counsel." However, the plaintiff

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appellant has not brought forward or placed in the agreed record on appeal the docket sheet or the court file in 80CVD367, and so we must presume as a matter of law that nothing within the file aids the plaintiff or reveals any genuine issue for a jury's determination in this case. *Town of Mount Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973). Our review for summary judgment purposes is necessarily limited to a determination of whether the pleadings plus the affidavit of the plaintiff raise a genuine issue of fact for trial. After a careful review of these documents we hold that there is no genuine issue of fact for trial and affirm summary judgment for the defendants Felton. Our analysis of the case follows.

By their motion the Feltons have taken on the burden of establishing that there is no genuine issue of fact remaining for the jury's determination and that as a matter of law they are entitled to judgment now. When the movant's motion is properly supported, then the duty falls to the nonmovant to come forward and set forth specific facts which will show that there is a genuine issue of fact. The nonmovant cannot rest on mere allegations in the pleadings or mere denials in an affidavit, but must bring forth facts which forecast that the claimant can at least make out a prima facie case. See *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). Here, the Feltons contend that the claim of Stephenson is nonexistent, or that even if a claim exists, it has not been pled so as to meet the minimum requirements of a claim, and that the forecast of the evidence shows that no prima facie case was made against them even with the use of Stephenson's affidavit.

We look now to the pleadings. As to the Feltons, the only substantive allegations in the Complaint against them are in paragraphs 38, 39, 43, and 44. The substance of paragraph 38 alleges the actual conveyance from the Joneses to the Feltons by warranty deed bearing "revenue stamps in the sum of \$80.00, indicating that the consideration paid by said Feltons was in the sum of \$80,000.00." The substance of paragraph 39 indicates that the property "is presently encumbered by a Deed of Trust Mortgage in the sum of approximately \$79,000.00, and that said property has a present market value of at least \$175,000.00."

The words that purport to allege the claim for relief appear only in paragraph 43. We quote it verbatim.

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43. That on December 29th and 31st, 1982, the additional defendant Coleman R. Felton, or the additional defendant Mary K. Felton, or their agents, did contact the plaintiff, with regard to inquiring about purchasing the referenced 3,100 sq. ft. brick dwelling house and premises from the plaintiff. On those occasions, plaintiff informed the said additional defendants Felton or their agents, that the property was presently legally titled to Thomas L. Jones, and wife, but that he (plaintiff) was in the process, through his attorney, of re-purchasing the land from the defendant Jones, and to please contact him on the following week, being the week of January 3, 1983. That the referenced Deed of Conveyance to the Feltons, from the defendants Jones, is of course dated January 3, 1983, but prior to and at the time of said conveyance the additional defendants Felton had actual notice from the plaintiff as to his claim and interest in the subject described real property.

Paragraph 44 is in the nature of a prayer for relief for Count Two of the Complaint which is the only count seeking relief against the Feltons. In this paragraph the plaintiff asks for damages against the Joneses, and for "equitable relief, in the nature of a rescission" of the deed from the Joneses to the Feltons, or alternatively, for a court ordered conveyance from the Feltons to Stephenson.

Over the centuries it has become fixed in our law that in order to create an enforceable contract to convey or reconvey land it must at the least be in writing. The complaint is very specific that any agreement to reconvey was oral. Pled in the complaint is a conversation between the plaintiff and the defendant Jones, who was then the plaintiff's attorney. Immediately following the plaintiff's award of an absolute divorce on 11 August 1981, Attorney Jones allegedly said to his client Stephenson:

Tony, you need to get that farm and house out of your name, until we get this property settlement mess straightened out. Just to make sure she doesn't get anything, I want you to Deed the farm and house to me, and I will reconvey it to you for whatever I have in it, plus eighteen (18) percent interest, when this matter is finally settled. In my opinion, this is the

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best thing you can do to protect your interest, and to make sure she doesn't get anything out of the property settlement case.

Relying upon this advice of counsel, the plaintiff alleges that he proceeded to convey by warranty deed the real property to Attorney Jones and his wife, the defendant, Paula H. Jones. This deed is silent as to any oral agreement to reconvey. However, upon delivery of this deed the plaintiff alleges further in paragraph 18 of the complaint that another oral agreement was made between Stephenson and Attorney Jones.

I'm going to give you a Promissory Note for \$30,000.00 bearing interest at 8% annually, and a Deed of Trust to secure it on the property, just in case anything happens to me while this matter is pending. Now I don't want you to record the Deed of Trust, because if you do, your former wife may find out about it and be able to get half or all of the money that it represents.

Further allegations say that Stephenson took possession of the promissory note and deed of trust and that he has never recorded the deed of trust.

Another uncontested intervening fact between the alleged oral promise to reconvey and the recording of the deed to the Feltons was a foreclosure sale of the property by the Federal Land Bank of Columbia, South Carolina, for nonpayment of its prior note and deed of trust. The foreclosure occurred on 25 September 1981, and the defendants Jones purchased the property at the foreclosure sale. Again, Stephenson alleges that at or immediately prior to the foreclosure sale Jones reiterated his promise to reconvey the property upon the conclusion of the domestic relations lawsuit.

An examination of Stephenson's affidavit of 14 March 1983 reveals that on 29 December 1982 the defendants Felton visited Stephenson at the house on the property in question and made a general inspection, that Mr. Stephenson confirmed that he was interested in selling his house, and that he had previously had the property surveyed so he could sell the house separately from the farm lands. When asked by Mr. Felton why Stephenson wanted to sell the house, Stephenson answered:

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I explained to him that I had been involved in a lawsuit with my ex-wife, for some period of time, and that ultimately, not only I, but my attorney Mr. Jones, and the Federal Land Bank Trustee and the Federal Land Bank had also gotten sued in that lawsuit, and that we had reached a settlement where I needed to sell the property in order to conclude the lawsuit and to protect my interest. I explained to them specifically, that at the present time, December 29, 1982, that the title to the property was in the hands of Mr. Thomas Jones, my former attorney in Murfreesboro, and that he was holding the deed until I could sell the property and get enough money so I could get the rest of them out of the ownership of the property. While we were having these discussions, I had my pile of papers concerning the lawsuit on the kitchen table, which included the maps of the property and matters pertaining to the lawsuit between my ex-wife and myself, as well as a note and deed of trust from Mr. Jones to me for the property. As I recall, Mr. Felton did not look at any of the papers personally, but we discussed generally what the problem was involving the real property aspect of the lawsuit, and as I have indicated above, the necessity for me to go ahead and sell this property in order to raise sufficient funds to make final settlement with the other persons concerned including Mr. Jones.

On 31 December, two days later, according to the affidavit, the Feltons again visited Stephenson at the house "but we didn't have any further discussions about the property being tied up in my lawsuit with my ex-wife." On 8 January 1983, Mr. Felton went to the law office of Mr. Jones, learned that Mr. Stephenson was preparing a lawsuit to include Felton, then went to see Mr. Stephenson to discover "what was going on."

In their Answer to the Complaint the Feltons deny that Stephenson is entitled to a reconveyance of the property. The Feltons admit that they are the registered titleholders and owners by recorded deed of 3 January 1983, that the deed bears revenue stamps of \$80.00, and that a current deed of trust of \$79,000.00 is on the property. Specifically, all of the facts alleged in paragraph 43 of the complaint are denied. Thus, for summary judgment purposes the only evidence in support of Stephenson's

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"denied" claim against the Feltons is his own affidavit of 14 March 1983.

[2] To remedy the evil of uncertainty of land titles, in 1885 the North Carolina General Assembly passed the Connor Act, now codified as G.S. 47-18. In that portion of the statute here involved, it provides that no conveyances of land or no contract to convey [or reconvey] land shall be valid to pass any property interest as against any purchaser for a valuable consideration from the bargainor but from the time of registration thereof. In particular, this law does not favor persons withholding from the public record deeds or contracts to convey [or reconvey] lands, particularly when third parties have given valuable consideration for same. See *Bell v. Couch*, 132 N.C. 346, 43 S.E. 911 (1903). "The purpose of the statute [now G.S. 47-18, as noted by its legislative author, Henry G. Connor, later the Justice of the N. C. Supreme Court who also authored the *Bell* opinion] was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the 'donor, bargainor, or lessor,' what did not appear did not exist." *Wood v. Tinsley*, 138 N.C. 507, 515, 51 S.E. 59, 62 (1905).

The bottom line reveals the defendants Felton to be bona fide purchasers for value of the Old Betty Stephenson farm lands and dwelling by warranty deed duly recorded from the defendants Jones. At the time the Feltons purchased the property, the uncontested facts show they paid \$80,000.00, plus obligated themselves to an encumbrance of a deed of trust for \$79,000.00, for a total value of \$159,000.00. As of the date of that transaction, 3 January 1983, the recorded title to the property was in the name of the defendants Jones. The Joneses became the record owners by virtue of the registration of their deed obtained in the foreclosure sale of the property by the Federal Land Bank for nonpayment. There is a total failure of proof by evidence in this record that the purchase by the Joneses was done pursuant to any parol trust with the plaintiff to reconvey the property to him. Whether plaintiff can prove a parol trust in his case against the Joneses is of no consequence here.

[3] The Feltons' purchase from the Joneses was without notice of any facts that would affect legal title. From the record before us, no *lis pendens* was pled, and none was proved. G.S. 1-116, et

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seq. Even taking the plaintiff's affidavit in the light most favorable to him, and inferring that Stephenson gave oral actual notice to the Feltons of the pending action 80CVD367, nothing appears to show that the pending litigation affected record title to the property. The plaintiff's affidavit is insufficient to contradict record title under the Connor Act.

[4] As stated in *Hill v. Memorial Park*, 304 N.C. 159, 165, 282 S.E. 2d 779, 783 (1981), "[w]here a purchaser claims protection under our registration laws, he has the burden of proving by a preponderance of the evidence that he is an innocent purchaser for value, i.e., that he paid valuable consideration and that he had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property." In his affidavit Stephenson said he "needed to sell the property in order to conclude the lawsuit and to protect my interest." Also, he explained to the Feltons that "the title to the property was in the hands of Mr. Thomas Jones . . . and that he was holding the deed until I could sell the property and get enough money so I could get the rest of them out of the ownership of the property." We hold that this evidence shows that when the Feltons purchased the property they were on notice that the Joneses alone held legal title to the property, that the Feltons could deal with the Joneses independent of Stephenson, and that Stephenson's desire was that the property be sold and that a sale of the property would protect his interest. Nowhere in his affidavit does Stephenson allege facts which would constitute a parol trust from the Joneses to reconvey the property directly to him alone.

The equities are in favor of the Feltons, and a failure of proof of any genuine issue of fact stops the pursuit by Mr. Stephenson of his alleged parol trust, of the unrecorded deed of trust, or of his claims against the lands and dwelling house. Secret trusts and hidden encumbrances, all unregistered, and for all of which there is a failure of proof of notice, must not be allowed to defeat a bona fide purchaser for value. As was said in *Beasley v. Wilson*, 267 N.C. 95, 97, 147 S.E. 2d 577, 579 (1966), "An unrecorded contract to convey land is not valid as against a subsequent purchaser for value . . . even though he acquired title with actual notice of the contract." Of like import is *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E. 2d 769, 771 (1965), "Actual knowledge, however full and formal, of a grantee in a registered deed of a prior

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unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel." Here, there is neither pleading nor proof that there was any fraud or estoppel in the Feltons' conduct.

We also call attention to certain other deficiencies in the pleadings. The complaint alleges a voluntary conveyance by the plaintiff to the Joneses and fails to allege that the Joneses had no intention of reconveying the property to the plaintiff in the future. The complaint shows that the Joneses became the owners twice, once by the original warranty deed from Stephenson and once through becoming the purchasers at the foreclosure sale. In the face of these allegations Stephenson's affidavit would show to third parties, at most, a wish or desire to repurchase the property and become the owner.

We hold that summary judgment was correctly entered for the defendants Felton.

We call attention to one other aspect of the judgment entered below. It provided:

IT IS FURTHER ORDERED that [the Feltons] shall pay any balance on the purchase price of said property, as it becomes due and payable, into the office of the Clerk of Superior Court of Hertford County and the Clerk shall hold same pending resolution of the issues between the Plaintiff and Defendants.

This part of the judgment shall remain in full force and effect until the issues have been resolved between the plaintiff and the defendants, Thomas L. Jones and wife, Paula H. Jones.

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

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STATE OF NORTH CAROLINA v. RANDY DALE WILLIAMS

No. 8326SC1133

(Filed 19 June 1984)

1. Criminal Law § 66.9— photographic lineup— no impermissible suggestion

Although defendant succeeded in highlighting many differences between the other subjects and himself in a photographic lineup, cumulatively they did not compel a conclusion that the photographic lineup, as a whole, was impermissibly suggestive.

2. Criminal Law § 66.1— in-court identification—properly admitted

In a prosecution for robbery, the trial court did not err in allowing a clerk to identify defendant in open court as the person who perpetrated the robbery where the witness had a few minutes to view defendant at extremely close range in a well-lighted area, testified that he paid close attention during the robbery, and identified defendant positively and without equivocation.

3. Criminal Law § 62— defendant's desire to take polygraph examination—not competent evidence

A trial court properly excluded on cross-examination questions designed to put before the jury the fact that the officer examined had refused a request to have defendant take a polygraph examination.

4. Criminal Law § 99.2— remark by trial judge—no prejudicial error

A remark by the trial judge upon sustaining an objection to defendant's attempt to introduce evidence regarding a requested polygraph exam that "you know better than that" did not reflect on the credibility of the witness or the weight of the evidence and was not prejudicial error.

5. Criminal Law § 169.7— exclusion of evidence—error—cured by introduction of similar evidence

The trial court erred in excluding testimony which was offered to show that an investigating officer, to whom defendant had relayed information, knew of the existence of another man resembling defendant who had been implicated in the armed robbery. However, no prejudicial error occurred since defendant testified to the substance of the statements and to his subsequent conversations with the officer and since the jury had a chance to view the other person who was brought into court, and saw a photograph of the other person.

6. Criminal Law § 99— bench conference—informing defense counsel of intention to issue bench warrants for perjury against both defendant and his fiancée—no denial of right to present evidence with effective assistance of counsel

A trial judge did not commit prejudicial error by informing defense counsel that he intended to issue bench warrants for perjury against both defendant and his fiancée because of apparent inconsistencies between their trial testimony and testimony at the *voir dire* on defendant's motions to suppress since the witnesses had presented the substance of their direct

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testimony before the conference occurred, and since nothing in the record suggests that the jury discovered the threatened perjury prosecution. Further, defendant suggested no specific evidence he might have offered but for the judge's remarks.

APPEAL by defendant from *Howell, Judge*. Judgment entered 9 June 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 May 1984.

Attorney General Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Arthur E. Jacobson for defendant appellant.

BECTON, Judge.

Based chiefly on the only eyewitness' testimony, defendant was convicted of armed robbery. On his appeal, we find no error.

I

A man brandishing a rifle held up a convenience store during the early morning of 1 February 1983; the store clerk was the only other person in the store. For approximately two minutes, the robber held the clerk at gunpoint in a well-lighted store, while emptying the cash register of \$78.00, and then ran off. The clerk immediately called the police and, the next morning, helped them prepare a composite drawing. He could not identify the robber from the police mug books, which, however, did not contain any pictures of defendant. Based on the clerk's description, the composite drawing, his familiarity with the crime area, and discussions with informants, the investigating officer suspected defendant and compiled a photographic line-up of six white males, including defendant. He showed the line-up to the clerk one week after the robbery. The clerk positively identified defendant as the robber. Police brought defendant in, and included him in a line-up; the clerk again selected defendant. Defendant was then arrested. At trial, the State's inculpatory evidence consisted of the clerk's testimony and clothes, found at defendant's home, which matched the robber's. Defendant relied on alibi and good character evidence. The jury found him guilty of armed robbery.

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II

[1] Defendant moved to suppress all evidence of the clerk's out-of-court identification based on the photographic line-up. Such evidence will only be excluded, however, when the facts reveal that the identification procedure was so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983).

The factors to be considered in evaluating the likelihood of irreparable misidentification are well established. See *Harris*; *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). Defendant focuses his attack on one factor—how the identification was conducted. He argues that the line-up was impermissibly suggestive because the other five photographs were dissimilar from his own in various ways. Unfortunately, defendant did not include the photographs as an exhibit to the record, so we must rely on the investigative officer's testimony concerning the individual photographs. His testimony indicates that he chose the other five photographs primarily based on similar hair and facial shape as well as race. Defendant succeeded in highlighting many differences between the other subjects and himself, but cumulatively they do not compel a conclusion that the photographic line-up, as a whole, was impermissibly suggestive. The human physiognomy necessarily differs from individual to individual, and fashions of hair style and facial hair create additional variations. Defendant, by cataloguing these inevitable variations in the six photographs employed, thus does not go far toward a showing of impermissible suggestion. As our Supreme Court, in language equally applicable here, has held concerning a group photograph:

Due process of law does not require that all participants in a lineup or in a photograph, viewed by the victim of or witness to a crime, be identical in appearance, for that would, obviously, be impossible. All that is required is that the lineup or photograph be fair and that the officers conducting the investigation do nothing to induce the witness to select one participant or subject rather than another.

State v. Montgomery, 291 N.C. 91, 100, 229 S.E. 2d 572, 579 (1976). No evidence of improper inducement appears, and the officer tes-

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tified that the other individuals were similar in many respects to defendant, although admitting the obvious differences. We are satisfied on this record that the trial court did not err in finding that the line-up was sufficiently fair and not impermissibly suggestive.

Further, examination of the other relevant factors supports our conclusion that a very substantial risk of irreparable misidentification has not been shown. The witness observed defendant carefully and at close range in a well-lighted area, identified him immediately and positively when shown the photographs a week after the robbery, and had not identified any other person or failed to identify defendant at any other time. The court did not err in allowing evidence of the out-of-court identification. *See Harris*.

III

[2] Defendant next contends that the trial court erred by allowing the clerk to identify him in open court. Again, *Harris* supplies the rule of decision. Applying the factors enumerated therein to the circumstances of this case as discussed above, we find no error. The witness had a few minutes to view defendant at extremely close range in a well-lighted area, and testified that he paid close attention during the robbery. He identified defendant positively and without equivocation. In light of this evidence and the other circumstances, we hold that the trial court did not err in allowing the in-court identification based on observation at the time of the robbery.

IV

[3] During cross-examination of the investigating officer, the trial court excluded cross-examination questions designed to put before the jury the fact that the officer had refused a request to have defendant take a polygraph examination. On identical facts we have previously held that such questions are properly excluded. *State v. Makerson*, 52 N.C. App. 149, 277 S.E. 2d 869 (1981). In *Makerson* we held that since the results of polygraph tests were inadmissible except by stipulation, defendant's willingness to take one absent such stipulation was "simply not competent evidence." The *Makerson* Court held:

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We subscribe to a strict enforcement of the general principle that all references to these tests should be kept from the hearing of the jury. If the results of the test are not competent evidence, then references to the tests are not relevant and should be held inadmissible, as was done in this case.

52 N.C. App. at 153, 277 S.E. 2d at 872. The subsequent decision of our Supreme Court in *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), establishing a blanket rule against admissibility of polygraph evidence in *any* trial, confirms and reinforces *Makerson*. This assignment is therefore without merit.

V

[4] When defendant attempted to introduce evidence regarding the requested polygraph exam, the trial court sustained the State's objection and told defense counsel, "You know better than that." Defendant alleges error. We have reviewed the record carefully and this statement constitutes the only such remark by the trial judge. The statement does not reflect on the credibility of the witness or the weight of the evidence; rather it followed a correct legal ruling excluding evidence rendered highly suspect by recent and well-publicized decisions of our Supreme Court. We find no prejudicial error. *See State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974) (no error when judge told the defendant "you don't have to talk like that").

VI

[5] Defendant next contends that the trial court erred in sustaining objections to questions asked of him on direct examination concerning conversations he had overheard in the jailhouse, when the testimony was not being offered to prove the truth of the matter stated. The proffered testimony consisted of statements by defendant's fellow prisoners which tended to implicate another man resembling defendant in the armed robbery. The defendant's testimony was offered to show that the investigating officer, to whom defendant relayed the information, knew of the existence of this other person. For this purpose, his testimony should have been admitted. *See* 1 H. Brandis, *North Carolina Evidence* § 141 (2d rev. ed. 1982). Nevertheless, no prejudicial error occurred, since defendant testified to the substance of the statements and to his subsequent conversations with the officer. Moreover, the

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jury saw the defendant and the other person together when the other person was brought into court, and saw a photograph of the other person. It is well established that when evidence of similar import to improperly excluded evidence comes in at other times, the exclusion does not constitute prejudicial error. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967).

VII

[6] Defendant's fiancée testified for him, presenting evidence of alibi. Defendant later took the stand in his own behalf and testified on direct examination about his reduced financial circumstances, his alibi defense, and various other matters. After apparently "summing up" with a question about whether defendant would ever be inclined to commit armed robbery, defense counsel approached the bench where an off-the-record colloquy took place. Afterwards, defense counsel indicated that he had no further questions.

During the conference at the bench, the trial judge informed defense counsel that he intended to issue bench warrants for perjury against both defendant and his fiancée because of apparent inconsistencies between their trial testimony and testimony at the *voir dire* on defendant's motions to suppress. Relying on *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976), defendant claims prejudicial error and denial of his right to present his evidence with the effective assistance of counsel.

We believe that both *Rhodes* and the recent decision in *State v. Locklear*, 309 N.C. 428, 306 S.E. 2d 774 (1983), are distinguishable from the case *sub judice*. In *Rhodes*, the trial judge made "extensive, accusatory, and threatening" comments, including threats of prosecution for perjury, to one of the principal defense witnesses. The judge's comments resulted in the defense abandoning its examination, although the witness had not yet presented her version of the allegedly criminal events, and although this left a devastating prior statement unexplained. Writing for a unanimous court, Chief Justice Sharp held that the judge had improperly projected himself into the case and thereby altered defense counsel's trial strategy.

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In *Locklear*, the trial judge repeatedly admonished a recalcitrant witness, out of the presence of the jury, concerning the penalties for perjury and failure to answer. The witness then changed her testimony and incriminated the defendant. The Supreme Court, following *Rhodes*, ordered a new trial. In both *Rhodes* and *Locklear* the defense had not finished examining the witness. Both cases relied on *Webb v. Texas*, 409 U.S. 95, 34 L.Ed. 2d 330, 93 S.Ct. 351 (1972) (per curiam) (judge effectively drove witness off the stand before he testified; new trial).

By contrast, the witnesses here had presented the substance of their direct testimony. Defense counsel apparently was asking general concluding questions when the threats took place. Nothing in the record suggests that the jury discovered the threatened perjury prosecution. Cf. *State v. Simpson*, 233 N.C. 438, 64 S.E. 2d 568 (1951) (witnesses arrested for perjury during trial); *State v. Swink*, 151 N.C. 726, 66 S.E. 448 (1909) (similar facts). Defendant suggests no specific evidence he might have offered but for the judge's remarks. None of the questions on the subsequent cross-examination required answers which might have been affected by the judge's remarks. We therefore hold that defendant has shown no prejudicial error.

Defendant also contends under this assignment that the court improperly refused to allow him to delay his offer of proof of the statements by defendant's fellow prisoners discussed earlier, and that this refusal constituted further evidence of failure of judicial impartiality. The offer of proof contained no new evidence, however, but merely detailed the statements whose substance was already before the jury. Presumably, the judge was aware of this and the questions to which objection had been sustained. We do not discern any abuse of discretion in the court's refusal to delay the offer to the next day.

Perjury is not readily apparent when we compare trial and *voir dire* testimony. Prosecution for perjury is not a matter to be bandied about or treated lightly, and caution in suggesting or threatening prosecution is, therefore, appropriate. Nevertheless, as discussed above, no prejudicial error occurred.

VIII

The mandatory and presumptive sentence for armed robbery is fourteen years, while the maximum sentence is forty years.

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N.C. Gen. Stat. §§ 14-1.1, -87 (1981). The trial court found in aggravation that defendant had three prior convictions for felony larceny in 1975, all while being represented by counsel. In mitigation, the court found that defendant had been a person of good character or reputation in the community. Nevertheless, it found that the aggravating factors outweighed the mitigating factors and sentenced defendant to 25 years in prison. Defendant does not challenge the sufficiency of the evidence or the application of the law. The sentence was within the discretion of the trial court. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). The weight to be given the various factors found, and the degree to which they justify deviating from the presumptive sentence, also lie within the discretion of the trial judge, who hears the evidence and observes the demeanor of the witnesses. *Id.* Defendant's contention that the sentence imposed is extremely disproportionate to the effect the eight-year-old convictions *should* have had is accordingly without merit and the sentence is affirmed.

IX

We conclude that defendant received a fair trial, free from prejudicial error, and that the sentence imposed upon his conviction was proper.

No error.

Judges WELLS and JOHNSON concur.

IN THE MATTER OF: THE APPEAL OF MECKLENBURG COUNTY FROM
THE GRANTING OF THE APPLICATION OF ELECTRIC POWER RE-
SEARCH INSTITUTE, INC., FOR EXEMPTION BY THE MECKLENBURG
COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1981

No. 8310PTC973

(Filed 19 June 1984)

Taxation § 22.1— personal property owned by a scientific association—use by a contractor—exemption from ad valorem taxes

Personal property was "wholly and exclusively used by its owner" for nonprofit scientific purposes and was thus exempt from ad valorem taxes under G.S. 105-278.7 where the property was owned by a scientific association

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but was being used by a contractor hired by the association to conduct two research projects, and the substantial control exercised by the association over the property and the contractor shows that the contractor was acting as an agent of the association in its use of the property.

APPEAL by Electric Power Research Institute, Inc., from a Final Decision and Judgment of the North Carolina Property Tax Commission entered 14 April 1983. Heard in the Court of Appeals 6 June 1984.

This is an appeal by Electric Power Research Institute, Inc., from a denial by the North Carolina Property Tax Commission for exemption from ad valorem taxes on personal property in Mecklenburg County. Previously, the Mecklenburg County Board of Equalization and Review reversed the County Tax Supervisor's decision denying the application of Electric Power Research Institute for exemption. The Mecklenburg Board of County Commissioners appealed the decision to the North Carolina Property Tax Commission. That Commission, sitting as the State Board of Equalization and Review, heard the matter *de novo*, and reversed Mecklenburg County's Board of Equalization and Review.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by W. Samuel Woodard and Gary C. Ivey for the appellant.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade for the appellee.

HILL, Judge.

Electric Power Research Institute, Inc. (hereinafter "EPRI") is a nonprofit corporation incorporated under the laws of the District of Columbia. It operates in several states, including North Carolina. Its members consist of electric utilities and cooperatives. EPRI engages in scientific research related to the power industry. It has been granted tax exempt status under Section 503(c)(3) of the Internal Revenue Code and prior to the bringing of this suit had been granted exemption from the North Carolina income tax and sales and use tax. EPRI had heretofore been granted exemption from ad valorem taxes outside of North Carolina.

In addressing Mecklenburg County's appeal, the North Carolina Property Tax Commission (hereinafter "Commission") heard

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the matter *de novo*, and made the following pertinent findings of fact:

EPRI is engaged in two major research projects in Mecklenburg County. It leases a real estate facility in the University Research Park area near the University of North Carolina at Charlotte. EPRI is the owner of personal property having an ad valorem tax value of \$767,607.00, which was located in the real estate facility.

On 1 February 1980 EPRI entered into a master agreement with J. A. Jones Applied Research Company (hereinafter "Jones"), a for-profit company, to perform two major research projects. The personal property in question is being used in connection with the performance of the two projects by Jones. One project is being supervised by Gary Dau, an employee of EPRI, who resides in California. Mr. Dau was at the Charlotte plant twenty-one days beginning 1 January 1982 through October, 1982, and it was anticipated that he would be at the plant an additional ten days through December, 1982. The other project was supervised by Joe Danko, an employee of EPRI, and he also lives in California. Mr. Danko was at the Charlotte plant twenty days from 1 January 1982 through October, 1982, and it was anticipated that he would be at the plant an additional six days through December, 1982. The number of days spent by each EPRI employee is representative of the number of days any successor might be at the plant. Both EPRI employees were present to supervise the respective projects in accordance with the master agreement. All other employees at the Charlotte location are employees of Jones, the number of such persons being about fifty.

EPRI has approximately 700 employees, including administrators and scientists, who plan and manage research primarily carried out through other organizations. Most of these employees reside in California. The results of EPRI's research are published and made available to utility companies and to the public.

Jones does not lease the personal property owned by EPRI. Nor does EPRI receive any rent or other income from Jones. EPRI pays to Jones its costs and a fee for its services under the master agreement.

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Based upon its findings of fact and its rules of statutory construction, the Property Tax Commission concluded that G.S. 105-278.7(b)(1) does not allow the exemption of personal property owned by EPRI but used on a day to day basis by Jones. For the purpose of its decision the Commission assumed, but did not specifically reach, the conclusions of law that EPRI is a scientific association, that its personal property is used for nonprofit, scientific purposes, and that Jones is acting as agent or contractor for EPRI. Such conclusion effectively reversed the decision of the Mecklenburg County Board of Equalization and Review, thereby denying an exemption to EPRI for ad valorem taxes on its personal property.

The appeal presently pending is governed principally by the terms of G.S. 105-278.7 which provide in pertinent part as follows:

“(b) Personal property shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes; . . .

(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:

. . .

(4) A scientific association or institution.

. . .

(f) Within the meaning of this section:

. . .

(2) A scientific purpose is one that yields knowledge systematically through research, experimentation, or other work done in one or more of the natural sciences.”

Although several assignments of error are brought forth, we believe the controlling question is what constitutes “exclusive use by the owner.” The appellant EPRI contends that corporate entities are capable of acting only through agents, that is, pro-

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moters, officers, directors, employers, independent contractors, trustees, bailees, or other authorized or implied agents. On the other hand, the appellee Commission argues that the statute plainly sets out that the subject property to be eligible for exemption must be "wholly and exclusively used by its owner for nonprofit purposes" through its employees only.

In construing a statute several basic tenets stand out. First, it is elementary that statutes are to be interpreted by giving words their "natural and ordinary meaning." *Borders v. Cline*, 212 N.C. 472, 193 S.E. 826 (1937). Also, it is abundantly clear in North Carolina that exemption statutes are construed strictly in favor of taxation and against exemption, although such statutes are not to be stintingly or narrowly construed. *Sale v. Johnson, Commissioner of Revenue*, 258 N.C. 749, 129 S.E. 2d 465 (1963); *Seminary, Inc., v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528 (1960). Any ambiguity is resolved in favor of taxation. *In re Kapoor*, 303 N.C. 102, 277 S.E. 2d 403 (1981). The statute under which EPRI claims exemption, G.S. 105-278.7, establishes a three-prong test: (1) the property must be owned by a scientific association or institution; (2) the property must be wholly and exclusively used for scientific purposes; and (3) the property must be so used by its owner.

Our Supreme Court in *In re Forestry Foundation*, 296 N.C. 330, 250 S.E. 2d 236 (1979), addressed the issue of ad valorem tax exemption under the same statutory framework. Although the Court denied the tax exemption under facts non-assertive of an agency relationship, the decision focused on the purpose of the property's use and who had control over that use. In view of this decision, the rules of statutory construction, and the statutory test for exemption, we address the interpretation of the statute. In giving the words of the statute their natural and ordinary meaning, they must be applied to the facts of the case to which the statute is directed. There is no question as to ownership or purpose. EPRI is a scientific association and its personal property here is used for nonprofit, scientific purposes. Had the property been used by an employee of EPRI, the property would have been exempt from ad valorem taxation without question. But the property on a day to day basis was used by Jones, a contractor under the direction of EPRI. For the purposes of this appeal, therefore, the question before us in addressing what constitutes "wholly and

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exclusively used by its owner" is whether the purpose to which the property is being used is ultimately controlled by EPRI.

A corporation (including an incorporated association) is an intangible being. Its existence is mirrored in its corporate charter, a creature of the law. Standing alone it can do nothing. Only through its personnel can it perform any function. Generally, a board of directors or board of trustees molds policy for the corporation. The officers—president, vice-president, secretary, treasurer—are responsible for carrying out policies through departmental managers or superintendents. These middle management personnel direct supervisors and employees who are actually responsible for the day to day performances, such as operating machinery and the like; yet it is the corporation itself that *uses* the equipment, even though many of its personnel and employees never see the machinery operated.

The definitions of "use" are limitless. The record, through the testimony of Mr. Darius, the treasurer of EPRI, reveals the method of operation of EPRI, i.e., the "use" of the property by its owner. His testimony in pertinent part is as follows:

EPRI selects the type of research products to be evaluated. In very few cases does it do the research. Mathematical studies are done in its office, but hardware development is done in the field. EPRI's scientists and engineers reside in the home office in California, but the company has operations and offices elsewhere. Research is carried out all across the country and in foreign territories. The results of the experiments are provided to the public and to utilities at token prices.

Four projects are carried on in North Carolina, the principal one being in Charlotte. The real estate facility was originally owned by EPRI, but for reasons beyond the control of EPRI it was sold to a third party and leased back to EPRI. The personal property was selected for the project, purchased by EPRI and placed in the facility at Charlotte. EPRI planned, defined and managed the work done in the facility. It selected Jones for on site operations. Jones was selected to keep the money raised and spent and also to keep activities separate. It served EPRI exclusively. A master agreement between EPRI and Jones was entered into under the terms of which Jones could be discharged if the non-destructive problems had been solved by 1982 or if Jones

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was not doing a good job. A lean staff of EPRI people was on site from time to time so as not to duplicate facilities and technical competency, but it was expected that one or more permanent on site EPRI employees would be present as the facility expanded. EPRI pays a fee to Jones for its work and its actual costs.

EPRI controls the work at the Charlotte facility, and in so doing, controls employees of Jones in several ways. First, Jones reports to EPRI. EPRI uses controlled correspondence. Reports of technical nature are exchanged. Field audits are performed from time to time to make sure EPRI is getting dollar value.

Second, Jones performs tasks under EPRI's direction and control. Two representatives from California visit the Charlotte site twice a month. One of them is called the project manager. Both direct people at Jones to do certain things and carry out certain activities in connection with performance under the master agreement, including not only the formulation of the general plan but also detailed tasks. These tasks are monitored by telephone calls, correspondence, and visits to the facility.

Third, Jones maintains custody and care over EPRI's property and acts as the instrumentality for EPRI to use the property. The equipment on site and the subject of this controversy was acquired by EPRI under the terms of the master agreement for the performance of this project, and was shipped to the Charlotte facility by EPRI for educational purposes. EPRI does not lease the property or rent it to Jones. It receives no benefit or income from Jones for its use. EPRI controls the use of the property and determines what use to which it can be put. Jones does not use the property for any purpose other than that set out in the master agreement. All data generated by the facility belongs to EPRI. Insurance is carried and the premiums are paid by EPRI. It is the opinion of Mr. Darius that EPRI is bound by actions taken by Jones while it is using the equipment at the Charlotte facility.

In view of the substantial control exercised by EPRI over the property and Jones at the Mecklenburg facility, we hold that Jones was acting as agent for EPRI in its use of the personal property, and that EPRI controlled the ultimate purpose for which the property was used. We therefore conclude that the personal property was "wholly and exclusively used" by EPRI as its

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owner and qualifies for exemption from ad valorem taxes under G.S. 105-278.7.

The decision of the North Carolina Property Tax Commission is reversed. The case is remanded to the Commission for entry of judgment in accordance herewith.

Reversed and remanded.

Judges BECTON and BRASWELL concur.

JOSEPHINE GILLIS JENKINS v. AVA LINEBERRY WHEELER, ADMINISTRATRIX OF THE ESTATE OF LOUELLA S. WHEELER, AND AVA LINEBERRY WHEELER, INDIVIDUALLY, AVA LINEBERRY WHEELER, EXECUTRIX OF THE ESTATE OF AUSTIN BEDFORD WHEELER, NATIONWIDE MUTUAL INSURANCE COMPANY, AND JAMES L. WILSON

No. 8319SC396

(Filed 19 June 1984)

1. Appeal and Error § 6.2— dismissal of one defendant—interlocutory order—right of immediate appeal

Although an order granting one defendant's motion to dismiss was interlocutory, it affected a substantial right of appellant and was immediately appealable since multiple trials against different members of the allegedly collusive group of defendants could result from a dismissal of the appeal. G.S. 1-277; G.S. 7A-27(d).

2. Rules of Civil Procedure § 8— sufficiency of complaint

An order granting a motion to dismiss is erroneous if the complaint, liberally construed, shows no insurmountable bar to recovery. Dismissal is generally precluded unless plaintiff can prove no set of facts to support the claim for relief.

3. Attorneys at Law § 5.1— malpractice by attorney representing estate—right of heir to bring action

The sole heir of an estate had standing to sue an attorney for malpractice allegedly arising from a conflict of interest and collusion in failing to advise the administratrix to bring a wrongful death action for decedent's death.

4. Attorneys at Law § 5.1— malpractice action against attorney representing estate—sufficiency of complaint

The sole heir of an estate stated a claim for relief for malpractice against the attorney who represented the estate where she alleged that the attorney

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(1) failed to list a wrongful death action for decedent's death as an asset of the estate, (2) gave wrongful advice to the administratrix of the estate, and (3) breached his duty to the estate by continuing his representation of conflicting interests.

5. Attorneys at Law § 5.1— malpractice by attorney representing estate—action by heir not barred by contributory negligence

Contributory negligence by the sole heir of an estate, if any, in failing to seek removal of the administratrix who had the right to bring an action for decedent's wrongful death did not warrant dismissal of the heir's action against the attorney who represented the estate for malpractice in failing to advise the administratrix to bring a wrongful death action where the heir repeatedly requested that a wrongful death action be brought and offered to pay all expenses for it, and she was confronted by alleged collusion and willful obstruction on the part of the attorney and the administratrix.

APPEAL by plaintiff from *Lane, Judge*. Order entered 8 February 1983 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 7 March 1984.

Ottway Burton, P.A., for plaintiff appellant.

Moser, Ogburn, Heafner & Miller, by D. Wescott Moser and Michael C. Miller, for defendant appellee.

BECTON, Judge.

Plaintiff Jenkins is the sole heir of her natural mother, Louella Wheeler. Louella Wheeler was a passenger in a truck driven by her husband, Austin Wheeler, which was involved in a one vehicle accident on 19 May 1980. Louella Wheeler died 20 August 1980. Austin Wheeler, Louella Wheeler's second husband and no blood relation to Jenkins, renounced the administratorship in favor of his sister, Ava Wheeler, who qualified as administratrix of Louella Wheeler's estate. Austin Wheeler committed suicide at some point thereafter, and Ava Wheeler qualified to administer his estate as well. At the time of the accident, Austin Wheeler had an automobile liability insurance policy with Nationwide Mutual Insurance Company with a policy limit of \$25,000.

On 18 August 1982, Jenkins filed this action against Ava Wheeler, her attorney, James Wilson, and Nationwide. In essence, the Complaint alleged that defendants had breached various fiduciary duties and conspired to deprive Jenkins of any recovery on the Nationwide policy. As to attorney Wilson, the Complaint

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alleged that he failed to advise Ava Wheeler to list the wrongful death action as an asset of Louella's estate, that he improperly continued representation of conflicting interests, and that he wilfully refused to proceed with the wrongful death action despite Jenkins' insistence and offers to pay all costs, thus breaching the applicable standards of professional skill and ethics. Attorney Wilson's motion to dismiss was granted 8 February 1983; from that order Jenkins appeals.

I

[1] The order granting defendant Wilson's motion to dismiss was interlocutory, since other defendants remain in the action. It would not ordinarily be appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982) (dismissal only appealable if it discontinues the case); see also 2A J. Moore and J. Lucas, *Moore's Federal Practice* § 12.14 at 2341 (2d ed. 1984) (dismissal as to co-defendants under Rule 12 not ordinarily appealable). However, since multiple trials against different members of the same allegedly collusive group could result from dismissal of this appeal, we hold that the order affected a substantial right claimed by the appellant and will work a substantial injury to her if not corrected before an appeal from the final judgment. It is therefore immediately appealable. N.C. Gen. Stat. § 1-277 (1983); N.C. Gen. Stat. § 7A-27(d) (1981); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982).

II

[2] An order granting a motion to dismiss is erroneous if the complaint, liberally construed, shows no insurmountable bar to recovery. Dismissal is generally precluded unless plaintiff can prove no set of facts to support the claim for relief. See, e.g., *Snug Harbor Property Owners Ass'n v. Curran*, 55 N.C. App. 199, 284 S.E. 2d 752 (1981), *disc. rev. denied*, 305 N.C. 302, 291 S.E. 2d 151 (1982). For purposes of a motion to dismiss, the allegations in the complaint must be treated as true, and the complaint is sufficient if it supports relief on any theory. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E. 2d 69 (1981). Under the notice theory of pleading of our Rules of Civil Procedure a complaint should not be dismissed merely because it amounts to a "defective statement" of a good cause of action. *Lupo v. Powell, Comm'r of Motor Vehicles*, 44 N.C. App. 35, 259 S.E. 2d 777 (1979).

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III

The Complaint alleged that Wilson's acts of professional malpractice resulted in the administratrix's failure to sue Nationwide and the consequent loss of Jenkins' right to any recovery based on Austin Wheeler's negligence. Since ordinarily only Ava Wheeler, the administratrix, could properly bring suit for Louella Wheeler's wrongful death, and since any such recovery would have inured only to the benefit of Jenkins, Jenkins now seeks to recover the lost award from Wilson. Wilson argues (1) that Jenkins has no standing to bring the action, (2) that she has alleged no negligence, and (3) that she is barred by her own contributory negligence as a matter of law. We disagree.

IV

[3] North Carolina now recognizes a cause of action in tort by non-client third parties for attorney malpractice. *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). We established a general balancing test in *United Leasing*:

Whether or not a party has placed himself in such a relation with another so that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that the other will not be injured calls for the balancing of various factors: (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

45 N.C. App. at 406-07, 263 S.E. 2d at 318. Taking the Complaint in the present case as true and evaluating it in light of these factors, we conclude that Jenkins had standing to sue Wilson for his actions as legal representative of the estate.

First, harm to Jenkins as a result of Wilson's failure to press a meritorious claim was eminently foreseeable: Jenkins was the sole heir of Louella Wheeler's estate and any recovery would have inured to her benefit. Second, it is reasonably certain, again taking the complaint as true, that Jenkins suffered injury, since the complaint properly alleges facts regarding Austin Wheeler's

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negligence which would have entitled Jenkins to recovery, if the suit had been brought. Third, there were no intervening circumstances between Wilson's allegedly negligent conduct and Jenkins' loss, except the possibility of no recovery on the suit not filed. Since the complaint alleges facts which, if true, would entitle Jenkins to recovery, this connection is sufficiently close. Fourth, if plaintiff's allegations of conflict of interest and collusion are correct, Wilson's position is not morally sustainable under current conceptions of professional responsibility. And, finally, public policy has always required that attorneys represent their clients zealously. When the client merely *represents* a class of beneficiaries, the attorney should consider the beneficiaries' interests, without undue concern for the interests of the legal representative. We therefore hold that Wilson owed Jenkins a duty to use reasonable care in representing Louella Wheeler's estate, and that Jenkins had standing to sue Wilson in tort.

V

[4] We next turn to the question of whether Jenkins has properly alleged a violation of that duty. As noted above, Jenkins alleged (1) failure to list the wrongful death action as an asset of Louella's estate, (2) wrongful legal advice to Ava Wheeler, and (3) a conflict of interest. Wilson apparently should have listed the action as an asset of the estate; amounts so received are assets at least to the extent of funeral and limited medical expenses. N.C. Gen. Stat. § 28A-18-2(a) (Supp. 1983). To the extent that Jenkins thus would have had earlier notice of the existence of these assets and a better opportunity to protect her rights, the complaint thus raises a question of malpractice.

Jenkins' allegation that Wilson breached his duty to Louella Wheeler's estate by continuing his representation of conflicting interests also can support the claim. Wilson admits that he continued to represent Ava Wheeler even after she became the representative of both Austin Wheeler and Louella Wheeler. In a suit by Louella Wheeler's estate against Austin Wheeler's estate, any recovery by Louella Wheeler's estate in excess of the insurance policy limit could only come out of Austin Wheeler's intestate estate. Because Jenkins had not been legally adopted by Austin Wheeler and was only related to him through his marriage to Louella Wheeler, her natural mother, she had no beneficial in-

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terest in Austin Wheeler's estate. See N.C. Gen. Stat. § 29-15 (1976) (shares of other than spouse); N.C. Gen. Stat. § 29-17(a) (1976) (rights of adopted children); *In re Will of Wall*, 216 N.C. 805, 5 S.E. 2d 837 (1939); 26A C.J.S. *Descent & Distribution* § 34 at 578 (1956). Significantly, Ava Wheeler had a beneficial interest in Austin Wheeler's estate as his sister. G.S. § 29-15(4) (1976). Blocking a suit by Louella Wheeler's estate advanced Ava Wheeler's beneficial interest, and she, therefore, had conflicting interests of her own.

By continuing to represent both of these conflicting interests, Wilson subjected himself to an action for malpractice. "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C) [requiring full disclosure]." 4A N.C. Gen. Stat. App. VII, N.C. State Bar, Code of Professional Responsibility, DR 5-105(B) (Supp. 1983). "An attorney's representation of two or more clients with adverse or conflicting interests constitutes such misconduct as to subject him to liability for malpractice, unless the attorney has obtained the consent of the clients after full disclosure of all the facts concerning the dual representation." 7 Am. Jur. 2d *Attorneys at Law* § 198, at 248 (1980); see also Annot., 28 A.L.R. 3d 389 (1969); *Woodruff v. Tomlin*, 593 F. 2d 33 (6th Cir. 1979) (error to dismiss malpractice claim based on conflict of interest where attorney represented two sisters, driver and injured passenger). Nothing suggests that Wilson ever informed Ava Wheeler of this conflict; in fact, she alleged that she was without knowledge to answer Jenkins' allegations. We hold that Jenkins has sufficiently alleged malpractice on Wilson's part.

Jenkins also alleged that Wilson's legal advice to Ava Wheeler was wrongful and therefore also actionable. We are aware that an attorney acting in good faith and in an honest belief that his or her advice is well-founded is not answerable for mere errors of judgment. *Quality Inns Int'l, Inc. v. Booth, Fish, Simpson, Harrison and Hall*, 58 N.C. App. 1, 292 S.E. 2d 755 (1982). However, the complaint in this case alleges not only that Wilson represented conflicting interests but that he was in collusion with the other defendants. Under the circumstances, we hold that plaintiff has adequately pleaded bad faith on Wilson's part.

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We further conclude that the Complaint makes out a case of negligence against Wilson and should not have been dismissed on that ground.

VI

[5] Wilson finally contends that even if Jenkins has stated a malpractice claim, it is barred by her contributory negligence as a matter of law. Rather than sue for the lost cause of action, he argues, Jenkins' proper remedy was to seek removal of Ava Wheeler as administratrix. See N.C. Gen. Stat. § 28A-9-1 (1976).

Jenkins repeatedly requested that the cause of action be brought, and she offered to pay all expenses for it. However, she was confronted with alleged collusion and willful obstruction. So, within the two-year statute of limitations period, she filed the present action. We note that although Ava Wheeler was the proper party to bring the wrongful death action, G.S. § 28A-18-2(a) (1976), the "proper party" rules in this type of case have been relaxed in similar situations. *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E. 2d 253 (1963) (creditors or next of kin may bring action where administrator in collusion with debtor or other circumstances warrant relief); *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761 (1963) (action brought in good faith by one who later qualified as administrator related back to filing). Jenkins complied with all the prerequisites of *Spivey v. Godfrey*. On this record, we cannot say that her contributory negligence, if any, was such as to warrant dismissal under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1983).

VII

We conclude that Jenkins has standing to state, and has stated, a claim against Wilson. The trial court therefore erred in granting Wilson's motion to dismiss. The order appealed from is accordingly

Reversed.

Judges WEBB and EAGLES concur.

Poe v. Acme Builders

ROSCOE POE, EMPLOYEE v. ACME BUILDERS, EMPLOYER, AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, INSURANCE CARRIER

No. 8310IC783

(Filed 19 June 1984)

**Master and Servant § 55.1—workers' compensation—injury while shifting position
—no injury by accident**

Plaintiff did not suffer a compensable injury by "accident" when he sustained a knee injury in shifting from a bending to a squatting position while shingling a roof where plaintiff was hired to perform a number of tasks connected with his employer's business of home improvement, plaintiff had already worked on another shingling job prior to the one during which he sustained his injury and shingling was therefore one of plaintiff's usual and customary duties, and there was no evidence that plaintiff unduly exerted himself or made any unusual movements in changing his position.

APPEAL by defendants from North Carolina Industrial Commission. Opinion and Award entered 5 May 1983. Heard in the Court of Appeals 2 May 1984.

Defendants are appealing an order and award of the Industrial Commission which reversed an order of the Deputy Commissioner and awarded workers' compensation benefits to plaintiff on the grounds that plaintiff suffered an injury as a result of an accident arising out of and in the course of employment. The plaintiff employee had alleged in his claim that he sustained a knee injury, a torn medial meniscus, while working on a shingling job for defendant employer Acme Builders (hereinafter "Acme").

The parties are in substantial agreement as to the facts and circumstances leading up to plaintiff's claim, which are as follows: In June 1982, at the time of the alleged injury by accident, plaintiff had been employed by Acme Builders, a home improvement and remodeling business, for three or four months. Although plaintiff stated he was "hired as a carpenter," it appears from his testimony and also from the testimony of Acme's owner, that plaintiff was hired to and in fact performed a variety of tasks related to the home improvement business, including interior remodeling, constructing rooms, putting up aluminum siding, installing storm windows and doors, and shingling roofs.

Acme's owner testified that plaintiff, like all of Acme's employees, was not hired to do any one particular job, but to do

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"anything that comes to hand." Prior to the date of the incident upon which he bases his claim, plaintiff had done shingling for Acme on one other occasion, that occasion being during the only other roofing job Acme had obtained since plaintiff was hired by them.

In June 1982, Acme accepted the reshingling job in question. Plaintiff and other employees were assigned to work on this job. On the second day of the job, either the 17th or 18th of June 1982, at about 11 a.m., plaintiff, who had been on the job since about 7 a.m. that morning, allegedly injured his knee when he shifted his body from a bending posture to a kneeling or squatting position. According to plaintiff's testimony, when he changed position in this fashion, his "knee kind of popped and stung." Plaintiff was nevertheless able to continue to work for the remainder of that day and for some days thereafter, finally seeking medical treatment on 9 July 1982. Plaintiff's problem was diagnosed as a torn medial meniscus, which was ultimately treated by surgery. Plaintiff then sought workers' compensation benefits.

In the order and award issued upon the hearing of plaintiff's claim, the Deputy Commissioner found that plaintiff sustained an injury to his knee while working, but concluded that since the injury was sustained while performing assigned duties in a customary fashion, the injury did not occur by accident and was not therefore compensable. Upon plaintiff's appeal to the full Commission that body reversed, finding that shingling constituted an interruption of the plaintiff's work routine and that his injury was accidental and that he was entitled to compensation. From the order of the Industrial Commission awarding plaintiff workers' compensation benefits, defendants appeal.

McNairy, Clifford & Clendenin, by Harry H. Clendenin, III, for plaintiff appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Sally A. Lawing, for defendant appellants.

VAUGHN, Chief Judge.

The sole issue on appeal is whether plaintiff's injury was the result of an accident arising out of and in the course of employ-

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ment and therefore compensable under North Carolina's Workers' Compensation Act. We hold that the injury did not occur as a result of such an accident and reverse the decision of the Industrial Commission.

Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if caused by an "accident." . . . "Our Supreme Court has defined the term 'accident' as used in the Workers' Compensation Act as 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury' The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences."

Adams v. Burlington Industries, 61 N.C. App. 258, 260, 300 S.E. 2d 455, 456 (1983) (citations omitted). See also *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 111 (1962) (defining accident as "a result produced by a fortuitous cause"); *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 116, 292 S.E. 2d 763, 766 (1982) ("Unusualness and unexpectedness" are the essence of an accident).

Evidence which satisfies the requirements of an interruption of the work routine and the introduction of unusual conditions is typified by *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292 S.E. 2d 18, *review denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982), a case in which the court found as a matter of law that an accident occurred when the plaintiff sustained an injury while lifting a crate:

The heavier than expected and heavier than usual nature of the crate constituted the requisite "unlooked for and untoward event . . . not expected or designed by [plaintiff]." . . . The work routine, the lifting of lighter crates, was interrupted by the introduction of a crate heavier than expected and heavier than usual. This created an unusual condition, an unforeseen event"

Id. at 580-1, 292 S.E. 2d at 19. See *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980) (awarding benefits for plaintiff's back injury where there was evidence that plaintiff's

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normal work routine was interrupted when she had to pull a rod out of an unusually tight bolt of cloth, and evidence that the effort she exerted in so doing was unusual).

In the case at bar, we find no comparable unlooked for or untoward event interrupting the plaintiff's work routine. As stated in the order of the Deputy Commissioner,

The only interruption of claimant's work routine consisted of the pop in the left knee or the manifestation of injury itself. The terms "injury" and "accident" as used in the Workers' Compensation Act are not synonymous. *Rhinehart v. Super Market*, 271 N.C. 586, 157 S.E. 2d 1 (1967).

Circumstances sufficient to constitute an interruption of a given work routine typically involve an undertaking by the employee of duties not usual and customary. *Key v. Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E. 2d 254 (1977), contrasts with the instant case and gives an example of a factual context where plaintiff's customary job duties were interrupted. In *Key*, the plaintiff was a machine operator whose work almost exclusively entailed the handling of finished lumber. On the day in question, the plaintiff ruptured a disc when he attempted to help a fellow employee raise a large piece of scrap lumber. This Court stated that this evidence showed that the plaintiff was not carrying out his usual and customary duties, and affirmed the award of benefits made by the Industrial Commission.

The evidence in the case before us demonstrates exactly the opposite—that plaintiff was engaged in his usual and customary duties. Plaintiff was hired to perform a number of tasks connected with his employer's business of home improvement. Shingling was one of those tasks and was therefore a part of, rather than an interruption of, plaintiff's work routine. Plaintiff argues that he was hired as a carpenter, and that his normal work routine as a carpenter was therefore interrupted by the shingling job. The record reveals that plaintiff's assigned duties encompassed more than carpentry and hence we reject plaintiff's argument.

In *Faires v. McDevitt and Street Co.*, 251 N.C. 194, 110 S.E. 2d 898 (1959), the plaintiff, a carpenter, received his injury while stripping concrete forms. This job involved using crowbars and

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hammers to remove the forms from the hardened concrete that had been poured into the forms, and also to pull nails from the bottoms of the forms. There was evidence that this was not the sort of work usually done by the plaintiff, but instead was customarily done by laborers.

The evidence before us differs significantly from that of *Faires*. Plaintiff's testimony that he was hired as a carpenter furnishes only a superficial parallel. Unlike the evidence in *Faires*, the evidence before us does not support the conclusion that plaintiff was working at a job other than that for which he was hired when he was injured. An examination of the record satisfies us that regardless of whether plaintiff's job title was actually that of "carpenter," plaintiff was in fact hired to do a variety of jobs associated with home improvement. Shingling was one of those jobs. Plaintiff even testified that he had already worked on another shingling job prior to the one during which he sustained his injury. Shingling was therefore one of plaintiff's usual and customary duties.

There was evidence indicating that defendant did not obtain many shingling jobs, but we cannot say that the infrequency of shingling jobs rendered such jobs interruptions of plaintiff's work routine where plaintiff was hired to do an unspecified number of tasks related to home improvement. The assigning of an employee to a particular task where the work routine for that employee involves a variety of tasks does not necessarily constitute an interruption of the work. See *Hewett v. Supply Co.*, 29 N.C. App. 395, 224 S.E. 2d 297, review denied, 290 N.C. 550, 226 S.E. 2d 510 (1976) (no accident where plaintiff was employed as a yard worker and at the time of injury had been assigned work as a painter).

Furthermore, even if we were to find shingling an interruption of the plaintiff's normal work routine—and we emphasize that we do not—mere interruption of the work routine does not by itself insure the finding of a compensable accident. The interruption must introduce "unusual conditions likely to result in unexpected consequences." See *Adams v. Burlington Industries, supra*. For example, in *Faires v. McDevitt and Street Co., supra*, the plaintiff not only established an interruption of his normal work routine by producing evidence that he did not customarily perform the job during the performance of which he was injured,

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he also produced evidence of the extreme strain exerted in executing a task ordinarily carried out by two workers. The Supreme Court held that the hernia sustained by the plaintiff was an injury resulting from accident and awarded the plaintiff benefits. *Accord, Adams v. Burlington Industries*, 61 N.C. App. 258, 262, 300 S.E. 2d 455, 457 (1983) ("extra exertion and twisting movements . . . support the conclusion that plaintiff's injury resulted from an unexpected and unforeseen event . . ."). *Cf. Hewett v. Supply Co., supra* (no compensable accident where evidence merely showed that plaintiff, in climbing out of a cement bin he was painting, moved from a squatting to a standing position); *Southards v. Motor Lines*, 11 N.C. App. 583, 181 S.E. 2d 811 (1971) (factual findings that it was a hot day, that plaintiff dock worker was hurrying and that the load lifted weighed 120 pounds insufficient to support an award on grounds of accident). There is no evidence before us of unusual conditions, namely, no evidence that in shifting from a bending to a squatting position while shingling the roof, plaintiff unduly exerted himself or made any unusual movements.

"An injury which occurs under normal work conditions is not considered an accident arising out of employment." *Trudell v. Heating & Air Conditioning Co.*, 55 N.C. App. 89, 90, 284 S.E. 2d 538, 540 (1981). Plaintiff's knee injury occurred under normal work conditions. The evidence before us does not support an award of benefits under North Carolina's Workers' Compensation Act on the grounds of injury suffered as a result of an accident.

Reversed.

Judges BRASWELL and EAGLES concur.

Miller v. Ruth's of North Carolina, Inc.

THOMAS E. MILLER v. RUTH'S OF NORTH CAROLINA, INC., B & H FOODS, INC., FRANCES JUNE GRIFFIN, ROBERT GRIFFIN, RUTH'S OF SOUTH CAROLINA, INC., AND B & H, INC. OF CHESTER

No. 8326SC847

(Filed 19 June 1984)

1. Appeal and Error § 24; Corporations § 6— redemption of plaintiff's shares in defendant corporations— absence of exception— relinquishment of other claims

Where plaintiff minority shareholder failed to except to the trial court's conclusion that, upon payment by the corporate defendants for the redemption of his shares in the corporations, the corporate and individual defendants should be relieved and forever discharged for any obligation any of them might have by reason of acts of mismanagement or otherwise arising out of the operation of the corporate defendants, plaintiff thereby relinquished his right to pursue any other claims he might have against defendants which arose out of the management and operation of defendant corporations.

2. Pleadings § 17— function of a reply

The function of a reply is to deny new matter alleged in the answer or affirmative defenses which the plaintiff does not admit, and the reply may not state a cause of action.

3. Corporations § 14— redemption of plaintiff's shares in corporations— decision of wrongful conduct by plaintiff affecting corporations

Where the trial court ordered the corporate defendants to redeem plaintiff's shares in the corporations, the court properly entered summary judgment dismissing defendants' counterclaim for damages for breaches of plaintiff's fiduciary duties while an officer and director of the corporations since any wrongful conduct by plaintiff affecting the corporations would have been necessarily reflected in the amount the corporate defendants were ordered to pay as the fair market value of plaintiff's shares.

APPEAL by plaintiff and defendants from *Griffin, Judge*. Order entered 9 June 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1984.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage and Debra L. Foster for plaintiff appellant-appellee.

Fairley, Hamrick, Monteith & Cobb by S. Dean Hamrick and F. Lane Williamson for defendant appellants-appellees.

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BRASWELL, Judge.

This appeal is the third arising out of litigation between these parties. Ruth's I [now concluded and reported in 68 N.C. App. 40, 313 S.E. 2d 849 (1984)] concerned the denial of the plaintiff's request for attorneys' fees after maintaining a successful action in which the defendant-corporations were required to redeem the plaintiff's shares of stock. Ruth's II, currently before this Court, stemmed from the entry of summary judgment in favor of the defendants, dismissing an action filed on 15 January 1982 which included shareholders' derivative claims as well as plaintiff's individual claims. Ruth's III is the subject of this opinion. The plaintiff in this case has appealed the denial of his motion for leave of court to file a supplemental complaint and the granting of the defendants' motion to strike a supplemental claim in his "reply." The defendant-corporations have appealed the entry of summary judgment in favor of the plaintiff, dismissing their counterclaim.

The plaintiff sued as a minority shareholder in two food distribution corporations, Ruth's of North Carolina, Inc., and Ruth's of South Carolina, Inc. The defendant Frances June Griffin is the majority shareholder in these corporations as well as in the two other defendant corporations. The plaintiff, past president and director of the Ruth's corporations, brought this action on 6 December 1976 alleging various acts of mismanagement and breaches of fiduciary duty by the defendants.

The complaint sought relief by asking for the appointment of a receiver for the liquidation and involuntary dissolution of the two Ruth's companies, or in the alternative, by requiring the Ruth's companies to repurchase the plaintiff's shares at their fair market value. The defendants' answer contained a counterclaim seeking damages for various breaches of the plaintiff's fiduciary duties while an officer and a director of the Ruth's corporations prior to 6 December 1976 and as a shareholder since 6 December 1976. The plaintiff, on 22 March 1977 in response to the counterclaim, filed a document entitled "Answer to Counterclaim, Offset and Supplement to Complaint," seeking damages in the amount of one million dollars against the defendants Robert Griffin and Frances June Griffin for their efforts to squeeze the plaintiff out of the Ruth's corporations. The defendants, on 29 March 1977,

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moved to have the counterclaim asserted within the plaintiff's "reply" stricken. The motion was not ruled on at that time. The record further shows that, on 5 May 1981, the plaintiff made a motion for leave of court to file a supplemental complaint pursuant to G.S. 1A-1, Rule 15(d). This motion was denied.

This case went to trial on 11 January 1982. The plaintiff and the defendants differed on what issues were before the court. The plaintiff contended that he had alleged in his pleadings a derivative suit as well as an action for his individual claims against the defendants. The defendants, on the other hand, asserted that the only issue before the trial court was whether the court should appoint a receiver to effect dissolution and liquidation of the Ruth's corporations or whether the Court should enter redemption of the plaintiff's shares of stock. Based on these contentions, the trial court ordered "that only the issues involving the appointment of a receiver or alternative equitable relief should be tried in this action at this time, and that all other issues and claims, if any there be, should be, and hereby are, severed and to be tried separately." Thus, only the individual claims against these parties and not the derivative claims on behalf of the corporation were to be litigated at this time.

On 3 March 1982, the trial court, supported by findings of fact and conclusions of law, ordered in lieu of liquidation under its authority pursuant to G.S. 55-125.1 that "the respective Ruth's corporations shall purchase at their fair value the respective shares of the plaintiff in such respective corporations." Since no finding or conclusion of law in this judgment was excepted or objected to, the defendants' liability was not contested. A reference was then ordered and a referee was appointed to determine the shares' fair market value.

Based on the referee's report, the trial court ordered the plaintiff to deliver his shares in Ruth's of North Carolina and that the defendants pay \$165,615, plus interest, to the Clerk of Court. The plaintiff was also ordered to deliver his shares in the Ruth's of South Carolina to the Clerk and the defendant was required to purchase these shares for \$132,400, plus interest. Neither the plaintiff nor the defendants excepted to any of the trial court's findings of fact or conclusions of law in this judgment. Thus, the amount of the defendants' liability was not disputed.

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Thereafter, the plaintiff moved on 21 April 1983 for summary judgment. On 9 June 1983, "upon defendants' motion (filed March 29, 1977) to strike the counterclaim alleged in the reply of plaintiff, and upon the motion (filed April 21, 1983) of plaintiff for summary judgment dismissing the counterclaim," the trial court granted the defendants' motion to strike, dismissing the claim within the plaintiff's reply and granted the plaintiff's motion for summary judgment, dismissing the defendants' counterclaim. From this order, the plaintiff and the defendant Ruth's corporations appeal.

The plaintiff assigns as error the denial of his motion for leave of court to file a supplemental complaint and the granting of the defendants' motion to strike the supplemental claim in his pleading entitled "Answer to Counterclaim, Offset and Supplement to Complaint." These supplemental claims, denominated as such by motion or in the pleading itself, are governed by G.S. 1A-1, Rule 15(d). Generally, motions to allow supplemental pleadings should be freely granted unless their allowance would impose a substantial injustice upon the opposing party. *Foy v. Foy*, 57 N.C. App. 128, 290 S.E. 2d 748 (1982). However, by the very way in which this case has progressed, we find it unnecessary to reach a determination of whether these newly asserted claims within these supplemental pleadings would impose a substantial injustice against the defendants.

[1] By severing all other issues for trial, the trial court only dealt with those issues involving the individual claims brought by the plaintiff against the defendants and those brought by the defendants against the plaintiff. The first judgment entered in this case established the defendants' liability. Through the second judgment entered against the defendants, the amount of their liability was determined. Within the last judgment, the following conclusion of law appears, to which no exception was taken:

6. Upon payment by the corporate defendants of the amounts specified herein, the corporate defendants and the individual defendants shall be *relieved* and *forever discharged* for any obligation any of them may have by reason of any acts of mismanagement or otherwise arising out of the operation of the corporate defendants. (Emphasis added.)

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The trial court further provided that "[t]here is no just cause for delay and this is a final Judgment from which any party hereto may appeal." No appeal has been taken from this judgment. We hold that the plaintiff by failing to except to this conclusion of law has in effect relinquished his right to pursue any other claims he might have against the defendants which arise out of the management and operation of the defendant-corporations. The trial court, using its discretionary powers under G.S. 55-125.1(a)(4) for the protection of a minority shareholder, ordered relief which would best compensate the plaintiff once and for all. The trial court viewed the relief given as settling all the plaintiff's claims against the defendants. By not objecting, the plaintiff is bound by that "settlement." This reasoning is reinforced by the fact that within the "Supplemental Complaint" the plaintiff prayed for the exact relief—the redemption of his shares—as awarded in the final judgment. The plaintiff cannot now complain that his motion to file a supplemental pleading was denied when the relief sought in that pleading has been awarded.

[2] We similarly feel that the million dollar claim against the individual defendants asserted in the "Answer to Counterclaim" cannot now be pursued because the allegations of this claim also stem from alleged wrongdoing by the individual defendants in their management and operation of the Ruth's corporations. Also, G.S. 1A-1, Rule 7(a), provides in part that "[t]here shall be a complaint and an answer; a reply to a counterclaim denominated as such. . . . No other pleading shall be allowed." Plaintiff's response to the counterclaim is limited to a reply by this rule. There is no such pleading as an "Answer to Counterclaim, Offset and Supplement to Complaint." In any event, the function of a reply is to deny the new matter alleged in the answer or affirmative defenses which the plaintiff does not admit. A reply may not state a cause of action. *Phillips v. Mining Co.*, 244 N.C. 17, 92 S.E. 2d 429 (1956). Other matters within a reply outside of this scope may properly be stricken on motion. *Davis v. Highway Commission*, 271 N.C. 405, 156 S.E. 2d 685 (1967). Realizing that additional claims are not properly pled in a reply, the plaintiff in the "Answer to Counterclaim" asks that "this pleading be allowed by the Court as a supplement to plaintiff's Complaint pursuant to G.S. 1A-1, Rule 15(d). According to Rule 15(d), however, supplemental pleadings may be allowed upon a party's motion in the

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trial court's discretion, not as a matter of right, upon terms as are just. *See Deutsch v. Fisher*, 32 N.C. App. 688, 233 S.E. 2d 646 (1977), *affirmed*, 39 N.C. App. 304, 250 S.E. 2d 304, *disc. rev. denied*, 296 N.C. 736, 254 S.E. 2d 177 (1979). No abuse of discretion having been shown, we hold that the trial court properly denied the plaintiff's motion under Rule 15(d) and properly granted the defendants' motion to strike the supplemental claim in the document labeled "Answer to Counterclaim."

[3] The defendants, Ruth's of North Carolina and Ruth's of South Carolina, have also appealed in this case and have assigned as error the granting of summary judgment in favor of the plaintiff, dismissing their counterclaim. When the trial began and the parties differed as to what issues had been raised by the pleadings, the trial court ordered that only the issues involving the appointment of a receiver or the granting of any alternative equitable relief should be tried immediately. The issue of whether the plaintiff had properly pled a shareholders' derivative action was to be decided at a later date. With only the individual claims between the parties remaining, the trial judge made a final disposition of this part of the case when pursuant to his equitable powers under G.S. 55-125.1(a)(4) he ordered the corporate-defendants to redeem the plaintiff's shares. Because the trial court was in the process of resolving all of the individual claims asserted, any wrongful conduct by the plaintiff affecting the corporations would have been necessarily reflected in the amount that the corporate-defendants were ordered to pay as the fair market value of his shares. Thus, since the counterclaim was disposed of through the final judgment filed 19 October 1982, we hold that no genuine issue of any material fact existed for trial and that the trial court properly granted the plaintiff's motion for summary judgment.

With regard to both parties' appeal, the judgment of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

Conrad Industries v. Sonderegger

CONRAD INDUSTRIES, INC. v. WILLY SONDEREGGER, INDIVIDUALLY, AND
D/B/A SWISSARTEX EMBLEM, INC., AND KOENIG COMPANY OF ASHE-
VILLE, INC.

No. 8328SC1028

(Filed 19 June 1984)

**Rules of Civil Procedure § 60.2; Trial § 49— new trial for newly discovered evi-
dence—testimony recanted by witness**

In an action for the wrongful appropriation and use of trade secrets, the trial court did not abuse its discretion in awarding plaintiff a new trial on the ground of newly discovered evidence on an issue concerning defendants' use of plaintiff's computer list of the names of its customers where a defense witness approached plaintiff some five months after trial and recanted his trial testimony that defendants had not used two computer printout customer lists of plaintiff's to solicit business. G.S. 1A-1, Rule 60(b)(2).

APPEAL by defendants from *Allen, Judge*. Order entered in the Superior Court of BUNCOMBE County on 24 January 1983. Heard in the Court of Appeals 8 June 1984.

*Bennett, Kelly & Cagle by Harold K. Bennett for plaintiff ap-
pellee.*

Joel B. Stevenson for defendant appellant.

BRASWELL, Judge.

Defendants appeal from an order granting plaintiff a new trial on the grounds of newly discovered evidence. We affirm.

The parties are competitors engaged in the embroidered emblem industry. Willie Sonderegger, the individual defendant, a former employee of the plaintiff, was the President of the defendant Koenig Company of Asheville, Inc., which company, according to the Answer, "has undergone a corporate name change and is now SWISSARTEX EMBLEM INC. as of April 30, 1979." In the record and briefs the defendants are often labeled in the singular, referring to Willie Sonderegger as though he were the only party defendant.

The plaintiff contends that the defendant Sonderegger wrongfully took its computer list of customers' names, a trade secret, and used it to solicit business for himself and his com-

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panies. In the September 1981 trial the jury answered seven issues. Only Issues Nos. 5 and 6 are involved in this appeal:

5. Is the computer printout of the Plaintiff's customer names a trade secret of the Plaintiff?

ANSWER: Yes

6. Did the Defendants use the Plaintiff's customer name list without the permission and consent of the Plaintiff?

ANSWER: No

However, based upon the answers given by the jury, on all the issues, the court entered judgment against the defendants, permanently restrained them from using "the striking apparatus," an attachment to a punching machine, and enjoined the defendants from using the punch pattern tape of the American Flag owned and originated by the plaintiff and from producing emblems of the American Flag corresponding to said punch tape. Then, the court ordered:

3. That the computer printout of the Plaintiff's customer list in use in 1979 is a trade secret belonging to the Plaintiff.

On 2 March 1982 the plaintiff filed a "Motion for Relief From Final Judgment and For New Trial," pursuant to G.S. 1A-1, Rule 60(b)(2), on the ground of newly discovered evidence. Specifically, it moved "for a partial new trial on Issue #6."

At the time of the trial and for some period of time previously, Winfred O. McGraw had been the Sales Manager for the defendants. Mr. McGraw testified as a witness for the defendants. In January 1982 a heated argument developed between McGraw and Sonderegger. The result was that McGraw became suddenly unemployed. Immediately on 27 January 1982 the now disgruntled former employee of the defendants, McGraw, went to the plaintiff and recanted his trial testimony. Among other things, he told the plaintiff's officers that the defendants did have two computer printout customer lists of the plaintiff's and had used the lists to obtain names and addresses of persons to whom to write letters soliciting business from plaintiff's customers. Other matters of trade information were disclosed, as shown in his affidavit of 23 February 1982.

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Under Rule 60(b)(2) the law gives the trial court discretion to relieve a party from a final judgment upon a showing of newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial" within ten days after entry of the original judgment. This motion must be made within a reasonable time and within one year after the judgment was entered.

As we apply this law to our facts it is plain that the motion was timely filed. The final judgment occurred 4 September 1981. The discovery of the recanted testimony of the witness McGraw and of the existence of two computer lists of the plaintiff within the possession of the defendant Sonderegger during the critical times occurred on 27 January 1982, more than ten days after the final judgment. This motion was filed 2 March 1982, and thus was within one year of the entry of final judgment on 4 September 1981.

Only the issue of whether the plaintiff used due diligence to produce evidence at trial of defendants' alleged wrongful use of plaintiff's computer list remains. In framing this question in its brief, the defendant contends that the inquiry should focus on the "defendant's alleged wrongful use of plaintiff's computer customer list *in use in 1979*." (Emphasis added.) Also in its brief the defendants argue:

Because all of the evidence which Plaintiff forecast deals with a 1977 computer list and a list of unknown date obtained by Defendant prior to 1978, there is no way in which the alleged new evidence could produce an affirmative answer to Issue #6.

We disagree. There is no designation of year in the issue submitted to the jury. The inquiry and questions by plaintiff's counsel were addressed in an all-inclusive manner as to whether Sonderegger had ever had "any" computer list of the plaintiff's. In the face of Sonderegger's pretrial and trial denials, there was no reason for plaintiff to pursue the matter further.

But for Mr. McGraw's recanting his trial testimony some five months later, there was no means by which the plaintiff could have known at the original trial that McGraw's trial testimony was false. During the evidentiary hearing on the present motion

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the record shows that during his cross-examination Mr. McGraw said:

A. I only said what his attorney advised me to say.

* * * *

Q. You knew it wasn't true, and you testified anyhow under oath; is that correct? Is that your testimony?

A. Under the direction of his attorney, everybody that testified in [the original trial] testified incorrectly, falsely.

* * * *

A. Everybody that testified for him. That I know of.

* * * *

A. . . . Everyone that testified that had any connection or knowledge of this lawsuit. . . .

* * * *

A. I swore to what [defendant's] attorney told me swear to and—

* * * *

A. I was [sworn to tell the truth] and I was instructed by his attorney to tell a different story and by [Sonderegger]. As his agent and employee.

In other parts of his testimony, Mr. McGraw admitted that at trial he had said that customers were absolutely not obtained from any A-B or Conrad Industries list, but that now his testimony was that both Sonderegger and he had the same computer lists, at various times up to trial, and that these lists were turned over to the plaintiff subsequent to McGraw's discharge from defendant's employment. Also, Sonderegger's evidence at the hearing shows that he used certain names from the plaintiff's computer list to send letters soliciting customers. There was nothing in the pretrial events or cross-examination of the defendant or his witnesses after the denial by McGraw and Sonderegger of the computer lists to justify or require any further follow-up at trial. This can be illustrated by referring to Sonderegger's pre-

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trial deposition, which was received into evidence as defendants' Exhibit No. 5 for this motion hearing.

Q. Do you have any knowledge of their computer print-outs?

A. No.

At trial Sonderegger's story had been the same.

Q. All right. Do you have a computer printout like they say, as it comes straight from their computer?

A. I never had one. I never saw one. No. No.

However, during the motion hearing Sonderegger admitted that when this action was commenced he gave McGraw a computer printout customer list received from his half-brother, Pete Sommer, because he was afraid that he would be accused of having stolen the lists. At this hearing plaintiff physically offered into evidence two boxes of materials given to it in January 1982 by McGraw which included a complete computer printout of plaintiff's customer list.

Although the trial judge in his conclusion of law used the more polite word of "recanted," instead of "perjured" testimony, the result on the facts show that McGraw as defendant's witness gave perjured testimony at the original trial. We hold that the plaintiff used due diligence in bringing to the court's attention the merits of this motion and that the plaintiff could not have otherwise learned of the recanted evidence and perjured testimony but for the subsequent change by Mr. McGraw. The conclusion that the newly discovered evidence will probably result in an affirmative answer in plaintiff's favor on a new trial of Issue No. 6 is fully supported by the evidence.

By his final assignment of error the defendants contend that the court erred when it granted a new trial as a matter of law and not in the exercise of discretion. We disagree and hold the judge acted properly. After stating his separate findings of fact and conclusions of law, the judge decreed:

For the foregoing reasons, the Court now grants the Motion of the Plaintiff for a new trial as to Issue #6 and orders that the case be set for a new trial on said Issue.

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We hold this ruling to be a discretionary one. As noted earlier, the motion before the court was made under Rule 60(b)(2). This rule allows discretionary relief upon a proper showing. On the facts found and conclusions made we find no abuse of discretion in ordering a new trial. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). But see and compare *Carter v. Carr*, 68 N.C. App. 23, 26, 314 S.E. 2d 281, 283 (1984).

Affirmed.

Judges HILL and BECTON concur.

SOUTHERN WATCH SUPPLY COMPANY, INC. v. REGAL CHRYSLER-
PLYMOUTH, INC. AND CHRYSLER CORPORATION

No. 8326SC652

(Filed 19 June 1984)

Negligence § 29.1— automobile dealer—giving car key serial numbers to telephone caller—negligence—proximate cause of theft loss

Plaintiffs evidence presented genuine issues of material fact as to whether defendant car dealer was negligent in giving a telephone caller the serial numbers for the keys to a car purchased by plaintiff's salesman from defendant and whether such negligence was a proximate cause of plaintiff's loss when the trunk of the salesman's car was entered the next day by use of a key and plaintiff's jewelry was stolen therefrom.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 7 December 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 April 1984.

Paul Yandle was an employee of plaintiff Southern Watch Co., a wholesale seller and distributor of jewelry. Yandle's duties included travelling and soliciting wholesale buyers, and in his travels he customarily carried with him sample cases of jewelry, which he kept in the trunk of his car. In October of 1978, Yandle purchased an automobile from defendant Regal Chrysler-Plymouth, Inc.

On 21 February 1980, defendant received a call that was answered by Brenda Alexander, a bookkeeper for the company. The

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caller stated that he was calling from Hickory, North Carolina for Mr. Paul Yandle and needed the serial numbers for the keys to Mr. Yandle's car. Ms. Alexander was able to obtain the serial numbers and, without authorization, gave the numbers to the caller.

The next day, four cases of sample jewelry worth over \$59,000 were stolen from Yandle's automobile while he was calling on a customer in Hickory. A police investigation stated that the vehicle's trunk was opened with a key or similar device. The trunk was not pried open nor was the trunk lock broken. Despite the investigation, a suspect was not apprehended, although a witness stated that she saw a white male opening the trunk of a Chrysler automobile on or about 22 February 1980.

On 4 May 1981, plaintiff instituted this action, alleging negligence on the part of defendant. On 6 May 1981, the trial court granted defendant's motion for summary judgment and dismissed the action with prejudice. From that order plaintiff appeals.

Levine, Goodman and Carr, by Miles S. Levine, for plaintiff appellant.

John B. Yorke and Mark T. Sumwalt for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment in that plaintiff's evidence does present a genuine issue of material fact as to whether the negligence of defendant proximately caused plaintiff's loss. We agree with this contention and reverse the order of the trial court.

Summary judgment is proper only where there are no material facts in issue. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). However, summary judgment is a drastic remedy and should be exercised with caution. *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971).

This cautionary approach is particularly appropriate with negligence cases. Because the typical negligence case requires a determination of negligence and causation, "[i]t is only in the ex-

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ceptional negligence case that summary judgment should be invoked. Even where there is no substantial dispute as to what occurred, it usually remains for the jury to apply the standard of the reasonably prudent man to the facts of the case." *Roberson v. Griffeth*, 57 N.C. App. 227, 238, 291 S.E. 2d 347, 354, *disc. rev. denied* 294 S.E. 2d 224 (1982). Generally, summary judgment is a proper remedy only where it appears that there can be no recovery even if the facts as claimed by plaintiff are accepted as true. *Whitaker v. Blackburn*, 47 N.C. App. 144, 266 S.E. 2d 763 (1980). Similarly, where it is clearly established that defendant's negligence was not the proximate cause of plaintiff's injury, summary judgment is appropriate. *Edwards v. Akion*, 52 N.C. App. 688, 279 S.E. 2d 894, *aff'd*, 304 N.C. 585, 284 S.E. 2d 518 (1981). Applying these principles, we find that the trial court erred in granting summary judgment for defendant.

"Negligence is the failure to exercise that degree of care for the safety of others that a reasonably prudent person would exercise under the same circumstances," but "[t]o be actionable the conduct complained of must be the proximate cause of the injury." *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), *disc. rev. denied* 289 N.C. 296, 222 S.E. 2d 695 (1976). An essential element of proximate cause is that the harm be foreseeable. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Moreover, "[i]f it is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only 'that a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.'" *Id.* at 107, 176 S.E. 2d at 169 (*quoting Adams v. Board of Education*, 248 N.C. 506, 103 S.E. 2d 854 (1958)).

Plaintiff's evidence tended to show that Paul Yandle had dealt with defendant Regal Chrysler-Plymouth for over 20 years before he bought the automobile in 1978. A reasonably prudent person could find that an automobile dealership owes a duty to its customers not to divulge serial numbers over the telephone without the authorization of the customer, and that a reasonably prudent dealer would know that with the correct serial numbers keys can be duplicated. The evidence here establishes at the very least a genuine question as to whether defendant failed to meet

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the requisite standard of care and, thus, breached its duty to plaintiff.

Defendant contends, however, that summary judgment was proper in that plaintiff has failed to establish the essential element of proximate cause, but, instead, advances an argument based on mere speculation and conjecture. Again, plaintiff's evidence showed that on 21 February 1980 defendant's bookkeeper gave out the serial numbers over the telephone and that, on the very next day, Paul Yandle's trunk was entered and plaintiff's jewelry was stolen, ostensibly by the use of a key. Taken in the light most favorable to plaintiff, this evidence presents a genuine issue of material fact as to whether defendant's negligence proximately caused the loss of the jewelry. Certainly, it is reasonably foreseeable that the unauthorized act of giving the serial numbers to the caller could have been the cause of the theft. In any event, defendant has not shown that plaintiff's negligence was not the proximate cause of the injury. As the North Carolina Supreme Court stated in *Williams v. Carolina Power and Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979), "it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. '[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.'" *Id.* at 403, 250 S.E. 2d at 258 (*quoting* W. Prosser, Torts § 45 (4th ed. 1971)).

We find that the evidence introduced by plaintiff does establish a genuine question as to whether the negligence of defendant was the proximate cause of plaintiff's loss. This question should be answered by a jury. The order of the trial court granting defendant's motion for summary judgment is, therefore,

Reversed.

Judges HEDRICK and PHILLIPS concur.

Brewington v. Rigsbee Auto Parts

EARNEST L. BREWINGTON, EMPLOYEE, PLAINTIFF v. RIGSBEE AUTO PARTS,
EMPLOYER, AETNA LIFE & CAS. INS., CARRIER, DEFENDANTS

No. 8310IC786

(Filed 19 June 1984)

Master and Servant § 56— workers' compensation—accident not cause of paralysis

A finding by the Industrial Commission that a work-related accident did not cause plaintiff's paralysis was supported by the evidence where it was stipulated that there was no organic basis for plaintiff's paralysis; psychiatric testimony tended to show that plaintiff suffered from "conversion hysteria," that plaintiff's fall at work was a "triggering opportunity for gratification of previously unmet dependency needs," and that the feelings and emotions causing plaintiff's conversion disorder were not related to his employment; and plaintiff testified that he felt good about his job and enjoyed what he was doing.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award by Full Commission filed 2 May 1983. Heard in the Court of Appeals 2 May 1984.

This is a workers' compensation claim wherein plaintiff-employee seeks medical benefits, temporary total disability, and total permanent disability for injuries allegedly suffered in an accident arising out of and in the course of his employment.

Plaintiff worked for Rigsbee Auto Parts, salvaging cars. On 30 March 1981, while removing a heavy gasoline tank from one of the cars, plaintiff's foot slipped. He felt something snap in his back and fell to the ground, landing on his back. At that time, plaintiff felt a numbness or pinching in his lower back. When he got in his truck, he felt a severe pain in his lower back when he depressed the clutch. He drove the truck back to the shop area, a distance of one mile, without using the clutch to change gears by switching the ignition on and off. He walked into the shop and then to his own car, where he ate his lunch. After eating lunch, defendant called to Mr. Rigsbee to help him out of the car because he was in pain and unable to move his legs. Mr. Rigsbee called the Rescue Squad who then took plaintiff to Wake County Memorial Hospital.

Doctors at Wake County Memorial Hospital found no outward sign of physical injury and no other abnormal physical condition to explain plaintiff's pain. X-rays of plaintiff's spine were

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normal. Plaintiff was transferred to North Carolina Memorial Hospital that same day. There, examination of plaintiff revealed no injury to the spinal cord, no abnormalities in a myelogram test, and no evidence of hemorrhages in plaintiff's spinal fluid. An extensive battery of tests revealed no physical basis for paralysis; in fact, plaintiff had reflexes in his ankles which indicated that his paralysis and numbness did not have an anatomic basis. Nevertheless, plaintiff's paralysis persisted. A psychiatrist at North Carolina Memorial Hospital indicated that plaintiff was suffering from a "conversion reaction." A conversion reaction occurs when there is no anatomic basis for a set of physical symptoms; the physical symptoms originate in the brain and have as their basis some underlying conflict (such as the need to gratify unmet dependency needs or the need to express anger). This diagnosis was confirmed by Dr. Scarborough, another psychiatrist, after his examination of plaintiff. Plaintiff has stipulated that there is no organic basis for his paralysis.

Since plaintiff's discharge from North Carolina Memorial Hospital, his paralysis has continued and he spends most of the day in a wheelchair. In October of 1982, Deputy Commissioner Shepherd denied plaintiff benefits under the Workers' Compensation Act, concluding that the accident caused no physical injury to plaintiff and that his paralysis was not caused by the accident. On 2 May 1983, the Full Commission adopted and affirmed Deputy Commissioner Shepherd's decision denying plaintiff's claim. Plaintiff appeals.

Blanchard, Tucker, Twiggs, Denson & Earls, by Christine Y. Denson and Howard Twiggs, for plaintiff-employee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr. and Steven M. Sartorio, for defendants.

EAGLES, Judge.

Plaintiff assigns as error the Industrial Commission's failure to find that plaintiff's disability was causally related to plaintiff's accident at work on 30 March 1981. Plaintiff contends that there is no evidence in the record to support the Commission's finding of fact that plaintiff's condition was not caused by the accident on 30 March 1981. We do not agree.

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Findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even when there is evidence to support a contrary finding of fact. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). We must therefore determine whether there is competent evidence to support Deputy Commissioner Shepherd's Finding of Fact Number 6 which was adopted by the Full Commission. It reads:

The incident which occurred at work on 30 March 1981 did not *cause* plaintiff's condition, but instead provided an "opportunity for gratification of [his] previously unmet dependency needs," Plaintiff's Exhibit 1, and allowed him to let out feelings of anger which were difficult for him to express in any other way. There is no evidence that the nature of the accident or the fact that it occurred at work peculiarly contributed to the condition and symptoms which plaintiff now experiences.

The testimony of Dr. Walter A. Scarborough, Jr., a psychiatrist who examined plaintiff on two occasions, showed: that his diagnosis was that plaintiff suffered from "conversion hysteria"; that conversion hysteria is a loss of physical functioning that cannot be explained by a physical disorder but enables the individual to get support from his environment that he might not otherwise be getting; that the initial loss of function in a conversion disorder is the expression of unresolved emotional conflicts (the "primary gain"); that the continuing loss of function is a reaction to the gains the individual accrues as a result of the symptom, i.e., the support and care he receives (the "secondary gain"); that plaintiff's fall at work was a "triggering opportunity for gratification of previously unmet dependency needs"; and that the feelings and emotions causing plaintiff's conversion disorder here were not related to his employment. Plaintiff's own testimony was that he felt good about his job at Rigsbee and enjoyed what he was doing. We hold that this was competent evidence to support the Commission's Finding of Fact Number 6 (that the accident did not cause plaintiff's paralysis) and that this finding of fact was conclusive. *Walston, supra*. The fact that plaintiff's fall at work was a "precipitating" or "triggering" event for his conversion disorder does not, without more, establish causation.

Because we hold that there was competent evidence to support the Commission's finding of fact that the 30 March 1981 acci-

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dent did not cause plaintiff's condition, we need not reach the issue of whether plaintiff's condition is a compensable injury.

The Opinion and Award of the Industrial Commission is

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

ROBERT JIM UNDERWOOD v. NELLIE D. WILLIAMS

No. 8310SC958

(Filed 19 June 1984)

Attorneys at Law § 6— withdrawal of attorney—reasonable notice to client—summary judgment at time of withdrawal

Where plaintiff's counsel had entered a formal appearance, he was obligated to provide plaintiff with reasonable notice of his intention to withdraw, and where the record failed to show that he did so, the trial court erred in entering summary judgment against plaintiff at the same time his attorney was allowed to withdraw. The absence of any formal request by plaintiff for a continuance does not change this result since plaintiff unsuccessfully requested an opportunity to obtain new counsel, and this was sufficient under the circumstances.

APPEAL by plaintiff from *Samuel E. Britt, Judge*. Judgment entered 28 February 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1984.

Bain & Marshall, by Elaine F. Marshall for plaintiff appellant.

No brief for defendant appellee.

BECTON, Judge.

The sole issue presented by this appeal is whether summary judgment was properly entered against plaintiff at the same time as his attorney was allowed to withdraw. The record does not indicate that the circumstances of the case justified entry of summary judgment, and we therefore reverse.

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Plaintiff Underwood filed his Complaint 6 December 1979, and defendant Williams filed her answer 2 January 1980. Apparently, nothing further occurred in this case until April, 1982, when the cause was transferred to Superior Court, and Williams moved for summary judgment. The record is again silent until 28 February 1983, when Underwood's counsel, who had signed his Complaint, filed a motion claiming that Underwood had discharged him and asking leave to withdraw. By order filed at 4:14 p.m. that same day, the trial court allowed the motion. The order simply stated that Underwood's attorney had shown good cause for withdrawal; it contained no specific findings of fact. A second order, filed at the same time, allowed Williams' motion for summary judgment. The subsequent record contains allegations by Underwood that he was denied the right to obtain new counsel.

Rule 16 of the General Rules of Practice for the Superior and District Courts provides:

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.

4A N.C. Gen. Stat. App. I(5), General Rules of Practice for the Superior and District Courts 16 (1970). Rule 16 is expressly based on *Smith v. Bryant*, 264 N.C. 208, 141 S.E. 2d 303 (1965). In *Smith*, when the case was called for trial, defendant's attorney announced that he had withdrawn as counsel because of nonpayment. Defendant disputed nonpayment, and requested a continuance. The trial court granted a continuance to obtain new counsel, but only to the next morning. The Supreme Court ordered a new trial, setting forth the three mandatory factors now embodied in Rule 16, *supra*. The Court, through Justice (later Chief Justice) Sharp, explained its decision thusly:

An attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation. [Citation omitted.] To the client . . . the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel and so that

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he may be heard if he disputes [the grounds for withdrawal]. To the court, which cannot cope with the ever-increasing volume of litigation unless lawyers are as concerned as is a conscientious judge to utilize completely the time of the term, the lawyer owes the duty to perfect his withdrawal in time to prevent the necessity of a continuance of the case. 'An attorney at law is a sworn officer of the court with an obligation to the public, as well as his clients, for the office of attorney at law is indispensable to the administration of justice.' [Citation omitted.] 'The attorney's obligation crystallizes into one of *noblesse oblige*,' [citation omitted].

As between the attorney and his client the relationship may ordinarily be dissolved in good faith at any time, but before an attorney of record may be released from litigation he must satisfy the court that he is justified in withdrawing. The first requirement for his withdrawal is proof of timely notice to his client. Obviously, written notice served on the client would be the most satisfactory evidence of compliance with this requirement.

* * * *

It is quite possible that [the attorney's] withdrawal from this case was entirely justified; that he had given defendant adequate notice; and that she had negligently or contumaciously failed to attend to her case. If these are the facts, however, the record fails to show them. It may well be that another trial will not improve defendant's situation; but, since she asks for it, on the record she is entitled to it.

Smith, 264 N.C. at 211-12, 141 S.E. 2d at 306. In *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976), the Supreme Court followed *Smith*, again ordering a new trial. In *Shankle*, respondents' attorney had accepted a retainer and accompanied them to court on the day of trial, but left upon discussing the case with the judge, who then denied respondents' request for a continuance. Compare *High Point Bank and Trust Co. v. Morgan-Schultheiss, Inc.*, 33 N.C. App. 406, 235 S.E. 2d 693, *disc. rev. denied*, 293 N.C. 258, 237 S.E. 2d 535 (1977), *cert. denied sub nom., Poston v. Morgan-Schultheiss, Inc.*, 439 U.S. 958, 58 L.Ed. 2d 350, 99 S.Ct. 360 (1978) (no formal appearance by or fee paid to fourth attorney; defendants filed answer *in propria persona* one

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week before hearing; no request for continuance; held: no error to enter orders where defendants unrepresented).

In the present case it is clear that Underwood's counsel had entered a formal appearance. *Smith*. Therefore he was obligated to provide Underwood with reasonable notice of his intention to withdraw. He may in fact have done so, and his withdrawal may have been entirely justified. But, as in *Smith*, the record fails to show any such facts, and if the trial court made any such inquiry, its findings are not before us. Accordingly, on this record Underwood is entitled to reversal of the summary judgment against him.

The absence of any formal request for a continuance does not change our result. Plaintiff unsuccessfully requested an opportunity to obtain new counsel; that is sufficient under the circumstances of this case. Obviously, an unrepresented litigant cannot be expected to make precisely correct procedural requests when confronted with sudden changes as occurred here.

We have expressed no opinion on the merits of the case; as in *Smith*, our holding may not improve Underwood's position one iota. All our decision means is that Underwood was entitled to a reasonable opportunity to obtain new counsel, which he did not receive. Therefore, upon his appeal, the summary judgment must be reversed and the cause remanded for further proceedings.

Reversed and remanded.

Judges HILL and BRASWELL concur.

JUDIE R. RUFFIN v. CONTRACTORS & MATERIALS, INC. AND DICKERSON, INC.

No. 8320SC922

(Filed 19 June 1984)

Negligence § 22— damages from operation of quarry—sufficiency of complaint

Plaintiff's complaint stated a claim for relief against defendant for damages to her real and personal property allegedly caused by defendant's negligent and unlawful operation of a rock quarry on property adjacent to that

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of plaintiff, and defendant failed to show that it was entitled to summary judgment as a matter of law.

APPEAL by plaintiff from *Seay, Judge*. Order entered 22 June 1983 in Superior Court, RICHMOND County. Heard in the Court of Appeals 4 June 1984.

This is a civil action wherein plaintiff seeks to recover \$50,000 for injury to real and personal property allegedly caused by defendants' operation of a rock quarry on land adjacent to that owned by plaintiff. By complaint filed 1 April 1983 plaintiff alleged that defendants should be held strictly liable for injury caused by their conduct in carrying on an "ultrahazardous activity," that their conduct constitutes an unlawful trespass and a nuisance, that defendants have behaved in a negligent fashion, and that defendants have violated "various federal and state laws and regulations governing blasting and related activities." Before filing answer the defendants filed a "motion to dismiss" supported by an affidavit of Koy E. Dawkins, counsel for defendants, which contained the following information:

On the 16th day of August, 1979, under my supervision, our firm prepared a deed from Dickerson, Inc. to Dickerson Realty Corporation for that real property which makes up the Rockingham, North Carolina quarry alleged to be adjacent to the lands of the Plaintiff.

A copy of that deed as recorded in Book 620, at Page 84 thru 86, in the office of the Register of Deeds of Richmond County is attached.

The defendants likewise filed a copy of the deed referred to in the affidavit. On 22 June 1983 Judge Seay allowed defendants' motion and entered an "order and judgment" wherein he dismissed plaintiff's complaint and entered summary judgment for defendant, Dickerson, Inc. Plaintiff appealed.

Sharpe & Buckner, by Richard G. Buckner, for plaintiff, appellant.

Dawkins, Glass & Lee, P.A., by Koy E. Dawkins, for defendant, appellee, Dickerson, Inc.

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HEDRICK, Judge.

In her brief plaintiff concedes that her claim against defendant Contractors & Materials, Inc., was properly dismissed. Thus, the trial court's order dismissing plaintiff's claim against defendant Contractors will be affirmed. We are thus concerned only with the propriety of the court's actions in regard to defendant Dickerson, Inc.

The rules governing dismissal of a claim under N.C. Gen. Stat. Sec. 1A-1, Rule 12(b)(6), North Carolina Rules of Civil Procedure, are well-settled. "A claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979). In ruling on a motion under Rule 12(b)(6), "the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979). Similarly, summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. Sec. 1A-1, Rule 56(c), North Carolina Rules of Civil Procedure.

In her complaint plaintiff alleged that her real and personal property had been damaged by the defendant's negligent and unlawful operation of a rock quarry on property adjacent to that of the plaintiff. Plaintiff has clearly alleged a claim for relief against the defendant, and she has not pleaded an insurmountable bar to her right to recover. As the movant for summary judgment, defendant Dickerson, Inc., has failed to offer by affidavit, exhibit, or otherwise any evidence disclosing that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law.

The "order and judgment" dismissing plaintiff's claim against Dickerson, Inc., will be reversed and the cause will be remanded to the Superior Court for further proceedings.

Affirmed in part, reversed and remanded in part.

Chief Judge VAUGHN and Judge WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 JUNE 1984

ASHLEY v. DELP No. 8323SC1138	Alleghany (80CVS83)	Affirmed
BONNEY v. BONNEY No. 831DC1148	Pasquotank (82CVD204)	Affirmed
BUCHANAN v. CITY MACHINE CO. No. 8329DC1321	McDowell (81CVD55)	Affirmed
CARTER ELECTRIC v. WINFREY No. 8221SC866	Forsyth (81CVS90)	Appeal Dismissed
COSTIN DISTRIBUTING v. KNIGHT No. 8310SC1030	Wake (81CVS8468)	Affirmed
DEMPSEY v. CONNER HOMES No. 836SC1205	Hertford (81CVS400)	Affirmed
GREER v. YOUNT CONSTRUCTION CO. No. 8310IC866	Industrial Commission (H-9353)	Affirmed
HARCO LEASING v. BOWMAN No. 8326SC855	Mecklenburg (81CVS2159)	Affirmed
HICKMAN v. FAMILY DOLLAR STORES No. 8318SC1262	Guilford (82CVS1906)	Affirmed
INMAN v. INMAN No. 8321DC1300	Forsyth (82CVD5603)	Affirmed
JONES v. BEAUNIT CORP. No. 8310IC765	Industrial Commission (H-808/H-5564)	Remanded
LEITNER v. LEITNER No. 8326DC971	Mecklenburg (82CVD10847)	Affirmed
LILES v. TEAL No. 8320SC1278	Anson (83CVS154)	Affirmed as to Nationwide; Reversed as to Teal; Remanded
LILLY v. CONTRACTORS & MATERIALS No. 8320SC921	Richmond (83CVS157)	Affirmed in part, Reversed and Remanded in part

LITTLE v. CHATHAM No. 8322DC1198	Alexander (82CVD236)	Affirmed
PRINCE v. DUKE UNIVERSITY No. 8310SC1107	Wake (82CVS2772)	Affirmed
SCALES v. WEARY No. 839SC1221	Granville (83CVS101)	Affirmed
STATE v. BROWN No. 8326SC1336	Mecklenburg (83CRS13302) (83CRS13303)	No Error
STATE v. ESTES No. 8324SC1283	Avery (82CRS2195)	Affirmed
STATE v. McQUAIG No. 8314SC1231	Durham (82CRS25470) (83CRS10228)	No Error
STATE v. THRALL No. 833SC1257	Craven (83CRS2325) (83CRS2326)	Affirmed
TARHEEL TRUCK v. ARNOLD No. 833DC1284	Pitt (82CVD1542)	Affirmed
WILSON v. LUMBERMENS No. 8318SC1261	Guilford (82CVS6350)	Affirmed
WILSON v. LUMBERMENS No. 8318SC1265	Guilford (82CVS6351)	Affirmed & Remanded

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AIR TRAFFIC CONFERENCE OF AMERICA, A DIVISION OF AIR TRANSPORT ASSOCIATION OF AMERICA v. MARINA TRAVEL, INC., AND PENELOPE CHAMIS

No. 8321SC1037

(Filed 19 June 1984)

1. Corporations § 13— misapplication of funds by manager of the corporation— owner not liable on basis of agreement

In an action in which plaintiff sought to hold the individual defendant personally liable for \$95,810.59 received from the sale of airline tickets but not paid to the applicable airlines, the trial court properly directed verdict for the defendant on the basis that the individual defendant signed a sales agency agreement with plaintiff "on behalf of the agency" as president-secretary and treasurer of defendant corporation. Plaintiff offered no evidence that the defendant signed the agreement accepting personal liability for the financial obligations of the agency to plaintiff, and plaintiff offered no evidence to justify piercing the corporate veil under the usual exceptions to hold the defendant personally liable.

2. Corporations § 13— defendant not liable for improper supervision of employees

In an action in which plaintiff sought to hold the individual defendant personally liable for money received from the sale of airline tickets but not paid to the applicable airlines, plaintiff failed to show that defendant failed to act with due diligence in her supervision of agents employed by defendant corporation where (1) plaintiff failed to offer evidence as to when and how and by whom the alleged misappropriation of funds occurred, and (2) plaintiff failed to show that defendant neglected to exercise the required standard of due care or that she even had a fair opportunity to discover the diversion of the proceeds. G.S. 55-35.

APPEAL by plaintiff from *Mills, Judge*. Judgment entered 25 February 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 8 June 1984.

White and Crumpler by Randolph M. James and William E. West, Jr., for plaintiff appellant.

Cofer and Mitchell by William L. Cofer and Dean B. Rutledge for defendant appellee.

BRASWELL, Judge.

The plaintiff seeks to hold Penelope Chamis personally liable for \$95,810.59 received from the sale of airline tickets but not paid to the applicable airlines. The complaint alleges that the

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defendant Chamis (hereinafter referred to as the defendant) is liable on the basis of: (1) an agreement she signed on behalf of the corporation promising to hold all receipts in trust for the carrier; (2) her participation in the misapplication and diversion of the ticket sale proceeds; (3) her breach of duty of due care and diligence by recklessly placing her confidence in untrustworthy employees; and (4) her unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes. At the close of the plaintiff's evidence, the defendant made a motion for directed verdict pursuant to G.S. 1A-1, Rule 50(a) which was granted. From this ruling the plaintiff appeals.

In January of 1980, the defendant acquired 100% of the stock of an existing travel agency incorporated under the laws of the State of New York. The corporation, Marina Travel, Inc., which was located in Commack, New York, had been operating under the control and sole ownership of Marina Armato. The travel agency was purchased by the defendant's estranged husband who worked there as a sales agent. He asked the defendant if she would act as president of the corporation "in name only."

The plaintiff Air Traffic Conference of America (ATC), is an unincorporated non-profit trade association composed of virtually all the airlines in the United States. The sole purpose of the ATC is to administer the sales agency agreements between travel agencies and the airlines. The ATC enables an airline to sell tickets through travel agencies throughout the United States rather than establishing their own office in each city. The money collected from airline ticket sales less the agency's commission is held in trust by the agency until satisfactorily accounted for to the airline carrier.

The defendant was required by the plaintiff to appoint a manager with at least two years' experience in the sales and promotion of air travel. Since the defendant had no prior experience in the travel agency business, Marina Armato was approved by the plaintiff to continue as manager of the corporation.

After the purchase of the agency had been completed, the defendant returned to Winston-Salem, North Carolina to run her newly opened restaurant, leaving the agency's operation to Armato and a staff of experienced employees. During 1980, the defendant traveled to New York only two or three times to check

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on the business because, as she testified, she was never a part of the decision making on a day-to-day basis or otherwise. She was advised by the staff on these visits and in a number of long distance telephone calls that business was slow.

In October of 1980, the plaintiff conducted a routine audit which revealed a \$5,000 deficit owed to the airlines by the agency. This amount was promptly paid. However, in January of 1981, when two drafts from the agency were dishonored for lack of sufficient funds, the plaintiff quickly took steps to close the agency. Subsequent audits disclosed unreported sales of airline tickets in excess of \$106,000.00. A bond recovery by ATC reduced the indebtedness claimed to \$95,810.59.

At trial, the defendant, who was called as an adverse witness, testified that only her estranged husband's money was invested into the travel agency, not her own, and that even though she was shareholder of 100% of the corporation she never received any money from the business. Although she was named president of the corporation, the defendant also stated that, because she was running her restaurant in Winston-Salem she left the operation of the agency to Armato who was the agency's previous owner and who had been approved by the plaintiff as its manager because of her travel business experience. Furthermore, she testified that she was not told when the agency was closed or about the second audit and that she had no knowledge of the diversion of funds until she was served with the complaint.

The only other witness called at trial was Richard Susmeier, a financial assistant employed by the plaintiff. He testified as to the exact amount diverted by the travel agency from the airline ticket sales, but had no knowledge as to the defendant's liability in the diversion or what she did or did not do in this particular corporation.

The only issue on appeal is whether the trial court properly granted the defendant's motion for a directed verdict. The scope of our review is whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). If the plaintiff fails to make a prima facie showing for relief, it is not entitled to have its case sent to the jury and the

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judge may rule on the issue as a matter of law. *Hong v. George Goodyear Co.*, 63 N.C. App. 741, 306 S.E. 2d 157 (1983).

[1] In the first count of the complaint, the plaintiff alleged that the defendant is liable for the missing funds because she signed a sales agency agreement with the ATC "on behalf of the agency" as President-Secretary and Treasurer of Marina Travel, Inc., accepting "full responsibility for all . . . financial irregularities, and all outstanding financial obligations, which have been or may be charged by ATC or any ATC carrier." However, the plaintiff offered no evidence that the defendant signed the agreement accepting personal liability for the financial obligations of the agency to the ATC. In this agreement, it is clear that the defendant only signed in her capacity and within her authority as a corporate officer. A default judgment against the corporation, which was also sued in this action, was entered on 7 June 1982. Thus, the corporation has been held accountable for its financial obligations to the ATC. The defendant cannot be held personally liable for the corporation's financial obligations merely on the basis that she holds 100% of its stock. A shareholder's limited liability for the obligations of a corporation is a special privilege for operating a business in corporate form. Robinson, N.C. Corporation Law and Practice Sec. 9-7 (3d ed. 1983). The plaintiff has offered no evidence to justify piercing the corporate veil under the usual exceptions and to hold the defendant liable. The plaintiff has also offered no evidence that would indicate that the defendant should be held liable on the basis of her officer status. Under North Carolina law, an officer cannot be held individually liable for the tortious conversion of property by the corporation or other corporate agents in the absence of her participation therein. *Peed v. Burleson's, Inc.*, 244 N.C. 437, 94 S.E. 2d 351 (1956). See also *Robinson, supra*, at Sec. 13-13. In the second count of the complaint, the plaintiff did allege that the defendant participated in the misapplication of the ticket sale proceeds, but failed to present at trial any evidence to substantiate that allegation. On the contrary, the only evidence that was brought forward tended to show that the defendant had no knowledge of the misapplication of the money or any other wrongdoing until after the agency was closed and she was served with the complaint. Thus, on the first two theories of relief against the defendant in the complaint, the plaintiff has failed to make a prima facie showing entitling it to

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relief. We hold that a directed verdict for the defendant was proper.

[2] The third count in the complaint charges that, as an officer of the corporation, the defendant is liable for placing her confidence in employees that she knew or should have known were untrustworthy. G.S. 55-35 imposes the same duty on directors and officers that they must "discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions." Thus, an officer may be held liable for the torts committed by agents of the corporation if the officer fails to act with due diligence in their supervision. *Robinson, supra*.

In the first place, the plaintiff has failed to offer evidence as to when and how and by whom the alleged misappropriation of funds occurred. Thus, it is mere speculation that the defendant was an officer at the time the deficiency in proceeds occurred or that she was responsible for the employees who allegedly diverted the funds. As required in *Minnis v. Sharpe*, 203 N.C. 110, 164 S.E. 625 (1932), there has been no showing of a causal connection between the loss of the plaintiff and any alleged negligence on the part of the defendant as chief officer of the corporation.

However, even assuming the alleged misappropriation took place while the defendant was the sole shareholder and president, the plaintiff has failed to make a prima facie showing as to her liability. In *Minnis v. Sharpe*, 198 N.C. 364, 151 S.E. 735 (1930), 202 N.C. 300, 162 S.E. 606, *reversed on other grounds*, 203 N.C. 110, 164 S.E. 625 (1932), the plaintiffs sought to hold the defendant-directors liable for the misappropriation of funds over a period of years by the corporation's general manager, vice-president and director. The complaint alleged that the directors neglected to exercise ordinary care in the performance of their duties and in selecting the general manager and that this neglect was the proximate cause of the plaintiff's injury. In the second *Minnis* case, 202 N.C. at 303, 162 S.E. at 607, the Supreme Court stated that:

Directors are not . . . insurers of the honesty and integrity of the officers and agents.

* * * *

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Ordinarily of course, directors would not be charged with notice by virtue of desultory, occasional or disconnected acts of mismanagement or fraudulent transactions, but in cases where mismanagement and fraud has been persistently and continuously practiced for substantial periods of time a jury must determine whether the directors, in the exercise of that degree of care which the law imposes, should have known of such practices and that persons dealing with the corporation would be injured thereby.

On the particular facts of the present case, the plaintiff has failed to show that the defendant neglected to exercise the required standard of due care or that she even had a fair opportunity to discover the diversion of the proceeds. *See also Cone v. United Fruit Growers' Association*, 171 N.C. 530, 532, 88 S.E. 860, 862 (1916). The plaintiff required that the agency be managed by someone with at least two years' experience in the sale and promotion of air travel. Marina Armato, who was the previous owner of the business, had the necessary experience and was appointed manager. The plaintiff offered no evidence that would indicate that the defendant's selection was imprudent or in bad faith. On the contrary, the plaintiff approved of the defendant's selection. There was also no evidence presented that the agency had failed to meet its financial obligations while under the sole ownership and control of Marina Armato which would have placed the defendant on notice as to Armato's trustworthiness and capabilities. The defendant testified that the ATC was not misled because she was the sole shareholder and named president of the corporation because the ATC "knew I was not experienced in the travel agency, they knew I had nothing to do with it before, they knew I had never worked in the travel agency. They approved Marina Armato [sic], so they knew I knew nothing about it." The plaintiff has also failed to present evidence that even if the defendant did unreasonably misplace her trust in the corporation's employees, that this failing was a proximate cause of the alleged misappropriation, especially in light of the fact that the plaintiff's own routine audits failed to disclose the extent of the misappropriations. *Minnis*, 203 N.C. 110, 164 S.E. 625 (1932). Again, because the plaintiff has failed to establish a prima facie case of the defendant's liability, we hold that the defendant's motion for a directed verdict was properly granted.

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Finally, the plaintiff seeks to hold the defendant liable on the basis that her conduct constituted unfair and deceptive trade practices and violated Chapter 75 of the North Carolina General Statutes. There was no evidence offered at trial to substantiate this allegation. For failure of proof with regard to this count, the directed verdict entered in favor of the defendant was proper.

Affirmed.

Judges HILL and BECTON concur.

SOUTHEASTERN ASPHALT AND CONCRETE COMPANY, INC. v. AMERICAN DEFENDER LIFE INSURANCE COMPANY, GEORGE W. LITTLE & ASSOCIATES, INC. AND GEORGE W. LITTLE, INDIVIDUAL

No. 8320SC959

(Filed 19 June 1984)

1. Insurance § 18.1— life insurance—misrepresentations as to health

The answers given to questions relating to health on a life insurance form are deemed material as a matter of law.

2. Insurance § 18.1— life insurance—misrepresentations as to health

In order to avoid a life insurance policy because of answers to health questions on a reinstatement application, the insurer had only to show that the answers were material and false and did not have to show that the falsehoods were fraudulently made with an intent to deceive.

3. Insurance § 18.1— life insurance—false statements concerning health—genuine issue as to placement on application by agent without insured's knowledge

In an action to recover on a life insurance policy, a genuine issue of material fact existed as to whether false answers to health-related questions on an application for reinstatement of the policy were placed on the application by defendant's agent without first propounding any of the questions to the insured so as to preclude defendant insurer's avoidance of the policy on the basis of such false answers.

4. Insurance § 11— life insurance—statements by agent—no liability for insurer's avoidance of policy

Although an insurance agent's statements that he believed "there would be no problem" with a life insurance policy on corporate shareholders may have induced the shareholders to go ahead with an agreement for the corporation to purchase the shares of either shareholder in the event of his or her death since the insurance proceeds were to fund such purchase, the agent

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could not be held liable to the corporate beneficiary when the insurer refused to pay because of false statements concerning the insured's health where there was no evidence that the agent's statements were made negligently or fraudulently in that there was no showing that the agent knew facts which would cause the insurer to seek avoidance of the policy.

APPEAL by plaintiff from *Seay, Judge*. Judgment entered 7 June 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 6 June 1984.

Van Camp, Gill & Crumpler by James R. Van Camp and Douglas R. Gill for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Theodore R. Reynolds and Benjamin F. Davis, Jr., for American Defender Life Insurance Company, defendant appellee.

Young, Moore, Henderson & Alvis by Joseph C. Moore, Jr. and Joseph W. Williford for George W. Little, defendant appellee.

BRASWELL, Judge.

The plaintiff is the named beneficiary of an annually renewable term life insurance policy issued by the defendant, American Defender Life Insurance Company. When American Defender refused to pay on the policy, the plaintiff brought this action against the insurance company and against the insurance agent, George Little, whom the plaintiff claims made false assurances that American Defender would pay on the policy. Upon their motions, the trial court granted summary judgment in favor of the defendants. The plaintiff appeals.

The pertinent facts of this case follow. In 1979, Jerry Killian owned approximately 70% of the stock in the plaintiff-corporation. The remaining 30% was owned by Phyllis Taylor. Although they did not immediately enter into a stock purchase agreement, they began negotiating an agreement wherein the plaintiff-corporation would buy annual renewable term life insurance policies on each of them, naming the plaintiff-corporation as the beneficiary, in order to enable the corporation to buy the shares of either shareholder in the event of his or her death. They bought these policies from American Defender through its general agent George W. Little. The policy on the life of Jerry Killian which is the subject of this lawsuit was issued on 28

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January 1980 in the amount of \$500,000.00. The plaintiff paid the first year's premium at this time.

The second year's premium, however, due on 28 January 1981 was not paid and the policy lapsed. In late March or early April, the plaintiff sought to have the policy reinstated. The parties disagree as to how the reinstatement forms were delivered to the plaintiff and filled out. The plaintiff claims that the forms were sent through the mail, signed on 10 April 1981, and mailed back to the defendant-agent Little with the premium check. The defendants assert that Little, between 1 April and 10 April 1981 stopped by the plaintiff's office, filled in the data given by Killian, and left the forms with Killian and Taylor to sign and mail when they had the premium check ready. Despite this difference, the defendants admit that the substance of the reinstatement form was filled in by Little, rather than by Taylor or Killian. In any event, the forms were signed on 10 April 1981 and mailed to Little who mailed them to American Defender's Raleigh office. American Defender began processing the reinstatement application on 17 April 1981 and granted it on 22 April 1981.

The reinstatement form signed by Killian asked the following questions:

11. Have you

- (a) Ever been admitted to, or been a patient in, a clinic hospital or institution for examination, observation, treatment or surgical operation?

* * * *

12. Have you ever had or been suspected of having any of the following:

. . . cancer . . . ?

13. Have you within the past 10 years consulted a doctor for any cause not mentioned in this Certificate?

14. Are you now in good health? If answer is "no", give details.

American Defender contends that Killian answered the first three questions "no" and the final question "yes" in spite of the fact that shortly before 10 April 1981 he had been examined by Dr. H. Vann Austin on 12 March and 3 April 1981 at the Pine-

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hurst Medical Clinic. Killian again saw Dr. Austin on 13 April 1981 who recommended that Killian undergo various laboratory tests. Some time between 15 April and 20 April 1981, Killian was told that the results of these tests indicated cancer. Killian was admitted to Moore Memorial Hospital on 20 April 1981 to determine the extent and origin of the cancer and any possible treatment. In anticipation and in preparation of Killian's hospitalization, Dr. Austin dictated the following History and Physical report:

The patient was asked to come in the hospital for a workup because of a skin biopsy which suggested adenocarcinoma, metastatic . . . [He] has felt generally "poorly" for some weeks . . . [as if] "there is something wrong inside of me." His specific problem recently has been severe left shoulder pain since Christmas . . . [which] has recently worsened . . . The patient has had multiple skin lesions for some weeks, worsening on his face . . . He was seen by Dr. Rostan (dermatology) who biopsied one of these lesions with the biopsy suggesting adenocarcinoma.

On 23 April 1981, insurance agent George Little met with David Williams, the certified public accountant who had been preparing the buy-sell stock agreement involving Killian, Taylor, and Southeastern Asphalt. During their conversation, both Little and Williams indicated that they understood that Killian was seriously, and quite possibly, terminally ill. According to Williams, Little stated that "everything was in order with the insurance policies and that there would be no problem with them." Phyllis Taylor also stated that before she entered into the stock purchase agreement she asked Little if there would be any problem with the life insurance policy on Killian being honored. Little replied that he did not know of any reason why there would be a problem. On 27 May 1981, the stock purchase agreement was entered into by Killian, Taylor, and Southeastern Asphalt. Had Little not given these assurances, Williams asserts that he would have advised Taylor not to enter into the agreement and Mrs. Taylor claims she would not have entered into the agreement.

Jerry Killian died on 6 July 1981. Pursuant to the buy-sell agreement, the plaintiff became obligated to purchase Killian's stock from his estate. However, when the plaintiff attempted to

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claim the benefits of the life insurance policy on Killian in order to buy his stock, American Defender denied coverage.

The only issue on appeal is whether the trial court properly granted summary judgment in favor of the defendants. G.S. 1A-1, Rule 56(c) states that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). The moving party, in this case the defendants, has the burden of showing that no material issues of fact exist. In rebuttal, the nonmovant must then set forth specific facts showing that genuine issues of fact remain for trial. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E. 2d 363, 366 (1982).

The defendant-insurance company asserts that summary judgment in its favor was appropriate because a policy of life insurance may be avoided by a showing that an insured made representations which were material and untrue. *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952). With regard to materiality, the insurance contract itself provides:

REINSTATEMENT: If this Policy lapses because of non-payment it may be reinstated at any time within five years after default in premium payment *upon presentation of evidence of insurability satisfactory to us*, and payment of all past due premiums . . . (Emphasis added.)

[1] As part of the evidence of insurability, the insured must submit an Application and Certificate of Insurability on which he must answer several health-related questions. The answers given to the questions relating to health on insurance forms are deemed material as a matter of law. *Eubanks v. Insurance Co.*, 44 N.C. App. 224, 231, 261 S.E. 2d 28, 33 (1979), *disc. rev. denied*, 299 N.C. 735, 267 S.E. 2d 661 (1980).

[2] The defendant-insurance company has also offered evidence through the affidavit of Dr. H. Vann Austin that at least one of

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Killian's answers to these health questions was untrue. The reinstatement form specifically asked whether the insured has within the past ten years consulted a doctor for any cause not previously mentioned in the Certificate. Killian answered no, although he had previously, within a month's time, been examined three times by Dr. Austin for severe pain in his left shoulder, left knee and hip and for multiple skin lesions on his face which had continued to worsen. These doctor's visits were not mentioned on the Certificate. Furthermore, Dr. Austin's affidavit reveals that Killian had "felt 'poorly' for some weeks" prior to 17 April 1981, suggesting that Killian's positive response to the question on 10 April 1981 that he was now in good health was also untrue. Thus, the defendant-insurance company has met its burden of showing that no genuine issue of fact exists for trial by demonstrating through its forecast of the evidence that it may avoid paying on the life insurance policy. It has produced evidence that Killian's answers to the reinstatement form's health questions were material and false. It did not have to further show that the falsehoods were fraudulently made with an intent to deceive. *Tolbert, supra*, at 418, 72 S.E. 2d at 917.

[3] In rebuttal, the plaintiff contends that under North Carolina law an insurer cannot avoid its obligations under a policy when the false answers in the insurance application were inserted by the insurance agent without first propounding any of the questions to the insured. *Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429 (1942); *Mathis v. Minnesota Mutual Life Insurance Company*, 302 F. Supp. 998 (M.D.N.C. 1969) (interpreting North Carolina law). As the record reveals, there is a sharp disagreement between the parties with respect to the facts surrounding the signing of the reinstatement form. The defendant-insurance company through the affidavit and deposition of George Little claims that between 1 April and 10 April 1981 Little went to the plaintiff's office, asked Killian the questions included on the reinstatement form, and checked the appropriate box on the form in accordance with Killian's answers. In his deposition, Little testified that he left the form at the office completed but unsigned to be mailed to him with the necessary premium check. The plaintiff on the other hand produced evidence through the affidavits of Pamela Calder and Sandra Cooper, office workers at Southeastern Asphalt, and by the deposition and affidavit of

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Phyllis Taylor that Little did not visit Killian at their office at any time before the reinstatement form was signed on 10 April 1981. Rather, according to Taylor, the reinstatement form was blank when received in the mail from Little, dated by her, signed in blank by Killian, and mailed back to Little.

Because of their divergent stories, the plaintiff contends that a genuine issue of fact exists as to whether Little filled in the reinstatement form after Killian had signed it but without ever discussing the form's health-related questions with him. We must agree. The question of whose story is to be believed must be left for the jury's determination. Because a forecast of the plaintiff's evidence does demonstrate that a genuine issue of fact remains for trial, we hold that summary judgment was improperly granted in favor of the defendant-insurance company.

[4] However, we do hold that the summary judgment entered in favor of the defendant-insurance agent (and his insurance agency which was also named as a defendant) was properly granted. The defendant-agent in support of this motion offered as evidence his own deposition. Little testified that when he gave assurances to David Williams on 23 April 1981 and later to Phyllis Taylor that the policy would be honored, he had no reason to believe it would not be. Killian entered the hospital on 20 April 1981 and the policy was reinstated on 22 April 1981. Little stated that he did not know of Killian's unreported doctor's visits before the policy and reinstatement and that as far as he knew Killian was in perfect health. Little did learn after Killian was hospitalized that adenocarcinoma had been diagnosed, but did not know he was terminally ill until the first of July before Killian died on 6 July 1981.

The plaintiff on the other hand has failed to produce evidence that Little knew, or should have known, at the time he gave the assurances that the insurance company would question the reinstatement months later. Contrary to the plaintiff's assertion, there is no evidence that Little knew facts on which the insurance company would seek avoidance of the policy. Although Little's statements that he believed "there would be no problem" with the insurance policy may have induced Taylor and Williams to go ahead with the buy-sell agreement, the plaintiff has brought forth no evidence which tends to show that these statements were negligently or fraudulently made.

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Summary judgment granted in favor of the defendant-insurance company is

Reversed.

Summary judgment entered in favor of the defendants, George W. Little and his insurance agency, George W. Little and Associates, Inc., is

Affirmed.

Judges HILL and BECTON concur.

BEATRICE JOHNSON INGLE v. CARNELL INGLE ALLEN, INDIVIDUALLY, CARNELL INGLE ALLEN, Co-EXECUTRIX OF THE ESTATE OF B. H. INGLE, SR., RUTH INGLE JOHNSON, INDIVIDUALLY, CARNELL INGLE ALLEN AND RUTH INGLE JOHNSON, TRUSTEES UNDER THE WILL OF B. H. INGLE, SR., W. A. JOHNSON AND MARTHA INGLE CURRIN

No. 8310SC963

(Filed 19 June 1984)

1. Courts § 4— superior court proper court for case alleging breach of fiduciary duty in administration of estate

A superior court had jurisdiction in an action in which plaintiff alleged breach of fiduciary duty, negligence, and fraud in the administration of her husband's estate and a trust created under his will since the claims' resolution was not a *part* of the administration, settlement and distribution of the estate, and since the amount in controversy exceeded \$10,000. G.S. 28A-2-1 and G.S. 7A-243.

2. Executors and Administrators § 38— breach of fiduciary duty and administration of estate and trust— instructions concerning proper

In an action alleging improprieties by defendants arising from the administration of an estate and a trust created under a will, the jury was not allowed, as defendants contended, to determine the trustees' obligations under the will where the jury was instructed that the trustees had an obligation to make payments from the trust to the beneficiary, and that the will controlled the time of such payments since the will clearly stated that payments of \$125 per month would be made to plaintiff, first from the income, and, if the income was insufficient, from the principal of the trust.

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3. Executors and Administrators § 38— breach of fiduciary duties in administration of trust created by will—element of harm found

In an action for breach of fiduciary duties in the administration of an estate and trust created under a will, the evidence at trial was more than sufficient to show that the defendants at no time intended to follow the intent of the testator with regard to the purposes of the trust, and the intent not to fulfill the purposes of the trust constituted the element of harm of taking "advantage of his position of trust to the hurt of plaintiff." Therefore, defendants' contention that the court misstated the law on the tort of breach of fiduciary duty in that it required the jury to find a breach of fiduciary duty without any finding of harm or unfairness to the plaintiff was without merit.

4. Evidence § 27— telephone conversation—admissibility of

The trial court properly admitted into evidence the testimony of plaintiff regarding a purported telephone call allegedly made by defendant Ruth Ingle Johnson where plaintiff testified that she could recognize defendant's voice over the telephone and that she had spoken with defendant "quite a bit," "a lot," and "many times." The weight of the evidence was for the jury.

5. Damages § 11.1— improprieties in administration of estate and trust—punitive damages properly submitted

In an action alleging improprieties by defendants arising from administration of an estate and trust created under a will, the evidence presented was sufficient to permit the jury reasonably to infer defendants' actions were motivated by malice, a reckless indifference to consequences, oppression, insult, rudeness, caprice or wilfulness thereby properly presenting the issue of punitive damages for the jury. The evidence showed that defendants distributed more than \$130,000 from a trust, contrary to the will and contrary to the advice of counsel, and converted the trust assets to their own use at a time when they knew the plaintiff had received no payments under the trust for a period of eight years. There was also evidence of accusations on the part of both defendants blaming plaintiff for the death of the testator.

APPEAL by defendants from *Hobgood, Judge*. Judgment entered 10 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1984.

Plaintiff institutes this action alleging improprieties by defendants arising from administration of her husband's estate and a trust created under his will. Plaintiff's husband died testate in 1971. Plaintiff and defendant Carnell Ingle Allen are co-executrices of his estate. Defendants Carnell Ingle Allen and Ruth Ingle Johnson are co-trustees of a trust established by the will. Defendant W. A. Johnson is attorney for the estate, and defendant Martha Ingle Currin purchased land owned by decedent which was allegedly sold by the other defendants pursuant to a fraudulent scheme.

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Plaintiff specifically alleges breach of fiduciary duties, negligence, and fraud, all arising from administration of the estate and trust. Plaintiff's prayer for relief seeks monetary damages, actual and punitive.

On 16 November 1982, summary judgment was granted for defendant W. A. Johnson. Jury trial commenced on 29 November 1982. On 6 December 1982, an order of dismissal was entered as to defendant Martha Ingle Currin. At the conclusion of the evidence, issues were submitted to the jury and answered as follows:

1. Did the Defendant Carnell Ingle Allen, breach her fiduciary duty to the Plaintiff in administering the Estate of B. H. Ingle, Sr.?

ANSWER: Yes

2. If the answer to issue 1 is "yes", in what amount, if any, was the Plaintiff damaged by the Defendant Carnell Ingle Allen's breach of her fiduciary duty as executrix to the Plaintiff?

ANSWER: \$1.00

3. Did the Defendant, Ruth Johnson, breach her fiduciary duty to Plaintiff as Trustee under the Will of B. H. Ingle, Sr.?

ANSWER: Yes

4. Did the Defendant, Carnell Allen, breach her fiduciary duty to the Plaintiff as Trustee under the Will of B. H. Ingle, Sr.?

ANSWER: Yes

5. If the answer to issues 3 or 4 is yes, in what amount, if any, was Plaintiff damaged by the breach?

ANSWER: \$26,500

6. Did the Defendant Carnell Allen commit constructive fraud?

ANSWER: Yes

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7. Did the Defendant Ruth Johnson commit constructive fraud?

ANSWER: Yes

8. If the answer to issues 6 or 7 is yes, in what amount, if any, was Plaintiff damaged by the constructive fraud?

ANSWER: \$1.00

9. What amount of punitive damages is the Plaintiff entitled to recover from the defendant Carnell Allen?

ANSWER: \$150,000

10. What amount of punitive damages is the Plaintiff entitled to recover from the defendant Ruth Johnson?

ANSWER: \$100,000

Judgment was entered upon the verdict from which defendants appealed.

Tharrington, Smith & Hargrove, by John R. Edwards and Elizabeth F. Kuniholm for plaintiff appellee.

Boyce, Mitchell, Burns & Smith, P.A., by G. Eugene Boyce for defendant appellants.

HILL, Judge.

Defendants Carnell Ingle Allen and Ruth Ingle Johnson bring forth five assignments of error concerning jurisdiction, instructions to the jury, admissibility of testimony, and submission of the issue of punitive damages to the jury. We have examined each of the assignments and find no basis for reversal.

[1] Defendants first contend the trial court erred in allowing plaintiff to raise in superior court the issues relating to defendant's alleged breach of fiduciary duty. Defendants assert that the clerk of superior court has exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act. G.S. 28A-2-1; *In re Estate of Adamee*, 291 N.C. 386, 398, 230 S.E. 2d 541, 549 (1976). This court has stated that plaintiff's claims of breach of fiduciary duty, negligence, and fraud are "justiciable

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matters of a civil nature,' original general jurisdiction over which is vested in the trial division." *Ingle v. Allen*, 53 N.C. App. 627, 628-29, 281 S.E. 2d 406, 407 (1981). The court went on to say that "[w]hile the claims *arise from* administration of an estate, their resolution is not *a part of* 'the administration, settlement and distribution of estates of decedents' so as to make jurisdiction properly exercisable initially by the clerk." *Id.* at 629, 281 S.E. 2d at 407 (original emphasis). The amount in controversy exceeds \$10,000. Therefore, under G.S. 7A-243, the superior court is the proper division within the trial division for resolution of plaintiff's claims.

[2] Defendants next contend the trial court erred in instructing the jury regarding (1) breach of fiduciary duty by defendants as trustees with respect to payments under the trust, and (2) breach of fiduciary duty by defendants with respect to repairs to a parsonage devised to plaintiff. Defendants argue resolution of these two issues depends upon an interpretation of decedent's will, and the trial court thereby erred in permitting the jury to interpret and construe the will.

The trial court instructed the jury with regard to monthly payments, in pertinent part, as follows:

I instruct you, under the law of North Carolina, that any real property devised to the trustees under such a will passes to the trustees upon the death of the testator, in this case, Mr. Ingle. Consequently, a testamentary trust containing real property comes into existence at the time of the death of the testator. Furthermore, I instruct you that where trustees are obligated to make payments from the trust to a beneficiary, such payments must be made from the date of the death of the testator, in this case Mr. Ingle, unless the will specifies some other time when payments are to begin.

The court went on to charge the jury that

. . . a trustee must carry out the obligations as they are set forth in the instrument establishing the trust. In this case, the trustees are required to pay for capital repairs . . . on the parsonage given to Mrs. Ingle for her life, and to pay Mrs. Ingle \$125.00 per month from the income and if necessary the principal of the trust. . . .

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The defendants contend the condition of the house at present is due to the plaintiff's failure to repair and that no demand for payment of any capital repair expense was ever made by the plaintiff. Payment is usually due only upon demand unless a contract specifies the time for payment. Here the provision of the will is controlling.

Thus, the jury was instructed that the trustee had an obligation to make payments from the trust to the beneficiary, and that the will controlled the time of such payments. The will clearly stated that payments of \$125.00 per month would be paid to plaintiff, first from the income and, if the income was insufficient, from the principal of the trust. The jury was not allowed, as defendants contend, to determine the trustees' obligations under the will. We conclude the trial judge correctly charged the jury under the circumstances of this case.

[3] Defendants next assign error to the court instructing the jury that if it found that defendants Allen and Johnson "in fact have never and do not now intend to establish and maintain a Trust fund from the residuary estate as directed in the Will, then you will find that they have breached their duty to [sic] loyalty and good faith." Defendants, citing *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981), contend this instruction misstated the law on the tort of breach of fiduciary duty in that it required the jury to find a breach of fiduciary duty without any finding of harm or unfairness to the plaintiff. This contention is without merit since the intent not to fulfill the purposes of the trust constitutes the element of harm of taking "advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, *supra* at 83, 273 S.E. 2d at 677, quoting *Rhodes v. Jones*, 232 N.C. 547, 548-49, 61 S.E. 2d 725, 726 (1950). The evidence at trial was more than sufficient to show that the defendants at no time intended to follow the intent of the testator with regard to the purposes of the trust. The trust corpus was distributed prior to the termination of the trust, contrary to the directive of the will which provided for such distribution only at the death or remarriage of plaintiff. Such evidence supports the cause of action against the trustees for breach of a fiduciary duty and supports the instruction as given by the trial judge. The charge as a whole is free from prejudicial error.

[4] Defendants next contend the trial court erred in admitting into evidence the testimony of plaintiff regarding a purported

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telephone call allegedly made by defendant Ruth Ingle Johnson. Defendants assert that no sufficient foundation was first laid to establish that the plaintiff recognized defendant's voice so as to properly identify her as the speaker. Plaintiff's testimony is admissible if the "identity of the person be shown directly or by circumstances somewhere in the development of the case, either then or later." *State v. Strickland*, 229 N.C. 201, 208, 49 S.E. 2d 469, 474 (1948); see also *State v. Graham*, 24 N.C. App. 591, 211 S.E. 2d 805, cert. denied, 287 N.C. 262, 214 S.E. 2d 434 (1975). Any lack of assurance or uncertainty on the part of plaintiff identifying defendant by voice recognition affects only the weight and credibility, and not the admissibility of her testimony. *State v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485 (1967). "As a general rule, the weight of voice recognition is a question of fact for the jury." *Id.* at 364, 154 S.E. 2d at 490.

When we apply the foregoing principles to the facts of the case under review, it is clear that the telephone conversations are competent and admissible. Plaintiff testified that she could recognize defendant's voice over the telephone and that she had spoken with defendant "quite a bit," "a lot," and "many times." The weight of the evidence was for the trier of facts, i.e., the jury in this case.

[5] Defendants finally contend that the trial court erred in submitting the issue of punitive damages to the jury due to insufficiency of the evidence. Punitive damages are allowable where a plaintiff has proved at least nominal damages, *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936), and where an element of aggravation accompanying the tortious conduct causes the injury. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). Such aggravation was early defined to include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness" *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E. 2d 297, 301 (1976). So long as there is "some fact or circumstance" in evidence from which one of these elements may be inferred, the question of punitive damages is for the jury and not for the court. *Shugar v. Guill*, 304 N.C. 332, 340, 283 S.E. 2d 507, 511 (1981).

Applying these principles of law to the facts of the case under review, we conclude that the evidence presented was suffi-

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cient to permit the jury reasonably to infer that defendants' actions were motivated by malice, a reckless indifference to consequences, oppression, insult, rudeness, caprice or wilfulness. The evidence shows that defendants distributed more than \$130,000 from the trust, contrary to the will and contrary to the advice of counsel, converting trust assets to their own use at a time when they knew the plaintiff had received no payments under the trust for a period of eight years. There was also evidence of accusations on the part of both defendants blaming plaintiff for the death of the testator. The evidence indicates that defendants' actions possess the aggravation element necessary to submit the issue of punitive damages to the jury.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. ORIEN CHALMERS POTTER

No. 833SC1151

(Filed 19 June 1984)

Criminal Law §§ 86.3, 102.7— improper cross-examination of defendant about prior crime—improper jury argument—new trial

In a prosecution for assault with a firearm on two wildlife officers, defendant was entitled to a new trial because of (1) the prosecutor's improper cross-examination of defendant about the details of a prior assault to which defendant had pled guilty and about whether defendant had paid the victim \$45,000 as a result of the assault and (2) the prosecutor's improper jury argument that the two wildlife officers could be prosecuted for perjury, fired from their jobs and lose their retirement if they testified falsely.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 6 June 1983 in Superior Court, PAMLICO County. Heard in the Court of Appeals 6 June 1984.

Defendant was indicted and convicted of two counts of assault with a firearm on a law enforcement officer. He was sentenced to consecutive prison terms of two years, suspended for all but six months, and ordered to pay a \$25,000 fine.

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Attorney General Rufus L. Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Beaman, Kellum & Stallings, P.A., by Norman B. Kellum, Jr. and J. Randal Hunter, for defendant appellant.

HILL, Judge.

On 23 October 1982, while patrolling in their marked vehicle for violators of hunting laws, two uniformed wildlife enforcement officers encountered defendant's truck in the roadway blocking their path. Defendant emerged from the truck brandishing a high-powered rifle, cursing, and threatening to kill the two officers. The officers identified themselves and their purpose but defendant continued his curses and threats. After about a fifteen minute standoff, defendant allowed the officers to pass. At no time did the officers attempt to draw their guns.

Defendant testified that he did not recognize the two men as being wildlife enforcement officers and that he had withdrawn his gun to shoot deer eating his crops. He denied cursing and threatening the officers and blocking their path.

Defendant brings forth two assignments of error. He first contends the court erred in allowing the prosecutor to cross-examine the defendant regarding details of the defendant's prior conviction of assault on a wildlife officer. For his second assignment of error he argues the court erred in allowing the prosecutor to enhance the credibility of the State's witness in his closing argument by implying the consequences of their failure to tell the truth and by stating his opinion as to their veracity. The two assignments overlap to some extent in our judgment and are addressed together.

It is well settled that when a defendant in a criminal action testifies in his own behalf, he is subject to good faith cross-examination regarding specific acts of misconduct which tend to impeach his character. *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981); *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972).

Defendant freely admitted that he pleaded guilty to assault in 1976 (the defendant had actually pled no contest to misdemeanor assault). The details of that prior conviction, which follow, and which the prosecutor placed before the jury, serve no rele-

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vant purpose when compared with their prejudicial impact on the jury:

PROSECUTOR'S QUESTION: And you beat him *so badly* that he *suffered permanent brain damage*, didn't he? (Emphasis added)

MR. KELLUM: Your honor, he is not a physician. There is no way he could know.

COURT: Overruled.

MR. MCFADYEN: If you know.

ANSWER: Really, I don't know.

QUESTION: Well, you know that that beating caused him to have to retire from his job, don't you?

MR. KELLUM: Objection.

COURT: Sustained.

ANSWER: I didn't know it.

MR. MCFADYEN: You know that he had to have medical treatment, don't you?

MR. KELLUM: Objection.

COURT: Overruled.

ANSWER: Say that again.

MR. MCFADYEN: You know that Mr. Wheless, as a result of the occurrence when you assaulted him, he had to receive medical treatment, didn't he?

ANSWER: As far as me knowing, I didn't know it. I heard he did.

QUESTION: Well now, you paid him \$45,000.00—

MR. KELLUM: Objection.

QUESTION: —to settle that assault case, in addition to pleading guilty to assault, didn't you?

MR. KELLUM: Objection.

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When the jury left the courtroom defense counsel made the court fully aware of the basis of his objection. While vigorous cross-examination is to be encouraged, it must not be used as a vehicle to inflame the jury. The defendant had pled guilty to the prior offense for which he was charged. The other questions posed could serve no purpose in challenging his testimony and could result only in inflaming the minds of the jurors.

The following jury argument by the District Attorney, taken singly or in combination with the prior improper cross-examination, warrants a new trial:

MR. MCFADYEN: What interest do these men, those two men have in coming into court, and not telling the truth, in telling something that's not true? They have an interest of losing their jobs, fired, ruining their careers.

MR. KELLUM: Objection.

MR. MCFADYEN: Weigh those two things against each other.

COURT: Overruled, as to that.

MR. MCFADYEN: Weigh those facts against each other and form some opinion in your mind as to who has the most to lose by not telling the truth in this case. . . .

. . .

Now I want you to think about for a minute too, and I want you to get back to this point, about the fact that you're going to have to believe these men are just not telling us the truth, have got to believe and find that, to find that man not guilty, come in here and say, "We, the members of the jury, find these two men swore on the Bible, and testified and were not telling the truth. They weren't mistaken, they weren't confused, they just weren't telling the truth." And now I wonder how many of you think that two men that work for the State of North Carolina could be prosecuted for perjury, fired from their jobs, lose their retirement —

MR. KELLUM: Objection.

COURT: Overruled.

MR. MCFADYEN: I don't honestly think that twelve citizens in this county are going to believe that either of these two

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men dislike Mr. Potter so much that they're going to come into court and risk their jobs and perhaps their families and everything they have just to convict that man.

G.S. 15A-1230(a) provides as follows: "During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice."

The Code of Professional Responsibility, DR 7-106(C)(3) provides that a lawyer may not in his argument to the jury "[a]ssert his personal knowledge of the facts in issue, except when testifying as a witness." Additionally, DR 7-106(C)(4) provides a lawyer shall not "[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated therein."

Justice Copeland, speaking for our Supreme Court in *State v. King*, 299 N.C. 707, 712-13, 264 S.E. 2d 40, 44 (1980), summarizes with clarity the responsibility of attorneys on closing arguments when he says:

Our cases provide that argument of counsel must be left largely to the control and discretion of the trial judge and counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955). Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Monk, supra*; *State v. Conner*, 244 N.C. 109, 92 S.E. 2d 668 (1956).

On the other hand, we have held that counsel may not place before the jury incompetent and prejudicial matters and may not "travel outside the record" by injecting into his argument facts of his knowledge or other facts not included in the evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d

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572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972). Upon objection, the trial judge has a duty to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. *State v. Monk, supra* and cases cited therein. Ordinarily, the objection to such improper remarks must be made before verdict to give the trial judge the opportunity to take appropriate action, or else the objection is deemed waived and cannot be raised on appeal except in a death case where the remark was so prejudicial that no instruction from the trial judge could have removed its prejudicial effect from the jurors' minds. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976); *State v. Locklear*, 291 N.C. 598, 231 S.E. 2d 256 (1977); *State v. Coffey*, 289 N.C. 431, 222 S.E. 2d 217 (1976). However, if the impropriety is gross the trial judge should, even in the absence of objection, correct the abuse *ex mero motu*. *State v. Monk, supra*; *State v. Smith*, 240 N.C. 631, 83 S.E. 2d 656 (1954).

The gravamen of defendant's complaint is not that the prosecutor suggested that the two wildlife officers were more credible than defendant—an argument which may, indeed, have been provoked by defense counsel's attack on the credibility of the two officers—but, rather, that the prosecutor made arguments based on matters outside the record by suggesting that the officers could be prosecuted for perjury, fired from their jobs, and lose their retirement or pension. To the extent any juror was placed in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer grievous penalties suggested by the prosecutor, the argument must be deemed improper. Further, parties should never be allowed to go outside the record in arguing the case, even under the guise of provocation.

For the above reasons, defendant is entitled to a

New trial.

Judges BECTON and BRASWELL concur.

Doud v. K & G Janitorial Service

GARRY L. DOUD, EMPLOYEE-PLAINTIFF v. K & G JANITORIAL SERVICES, EMPLOYER-DEFENDANT; FIDELITY & CASUALTY COMPANY OF NEW YORK, CARRIER-DEFENDANT AND/OR DANCY CONSTRUCTION COMPANY, EMPLOYER-DEFENDANT; AETNA INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8310IC9

(Filed 19 June 1984)

1. Insurance § 67; Master and Servant § 49.1— sole proprietor's employee status—insurance company estopped to assert notice requirement

Where defendant insurance company issued to plaintiff an insurance policy after an insurance agent completed a form entitled "Application For Workers' Compensation Insurance," drafted by the North Carolina Rate Bureau, the insurance company was estopped to assert the notice requirement of G.S. § 97-2(2), applicable to sole proprietors, to deny plaintiff coverage since the insurance company was put on inquiry notice that plaintiff, as a sole proprietor, had elected sole proprietor coverage, because (a) pursuant to G.S. § 58-124.18, the insurance company was a member of the Bureau and actively involved in its administration; (b) pursuant to G.S. § 58-124.17 (5), the Bureau was the insurance company's agent; and (c) the Bureau, created by G.S. § 58-124.17, drafted the controverted application form, and the insurance company's membership and representation in the Bureau charged the insurance company with constructive knowledge by putting it in possession of inquiry-triggering information.

2. Master and Servant § 50.1— plaintiff independent contractor at time of injury

The Industrial Commission properly found that plaintiff was not an employee of defendant contractor, and properly concluded that plaintiff was an independent contractor at the time of his injury where the evidence tended to show that (1) plaintiff was the sole proprietor of K & G Janitorial Services, an independent business; (2) plaintiff testified that he contacted the construction company in August 1980 "to contract out, to contract for cleaning up when the construction was finished"; (3) plaintiff orally contracted to clean the windows for a lump sum; and (4) plaintiff worked no set hours. G.S. § 97-2(2).

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 20 September 1982. Heard in the Court of Appeals 30 November 1983.

Jenkins, Lucas, Babb & Rabil, by S. Mark Rabil, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant appellees, K & G Janitorial Services and Fidelity & Casualty Company of New York and Underwriters Adjusting Company.

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Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and Henry W. Gorham, for defendant appellees Dancy Construction Company and Aetna Insurance Company.

BECTON, Judge.

I

Plaintiff, Garry L. Doud, appeals from the North Carolina Industrial Commission's Order dismissing, on jurisdictional grounds, his claim for workers' compensation benefits.

In April 1980, Doud began a cleaning service business, K & G Janitorial Services. On 16 April 1980 he completed an application for workers' compensation insurance with the aid of Ms. Meadow Patten, an insurance agent at Woody Clinard Insurance, Inc. Both Patten and Doud testified that Doud intended to insure himself and his employees. Effective 1 July 1979 the General Assembly had amended N.C. Gen. Stat. § 97-2(2) (1979 & Supp. 1983) to permit "[a]ny sole proprietor or partner of a business whose employees are eligible for benefits under this Article [to] elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business *and if the insurer is notified of his election to be so included.*" [Emphasis added.] The statute does not specify the method of notification. Prior to the 1979 amendment, sole proprietors could insure their employees but were ineligible for workers' compensation insurance themselves.

Patten completed a form entitled "Application for Workers' Compensation Insurance," drafted by the North Carolina Rate Bureau (Bureau) in August 1977. The Bureau's pre-amendment form did not include any space to elect or designate sole proprietor coverage. Patten named Garry Doud DBA K & G Janitorial Services as the employer. Patten specified that the employer's legal status was "Individual." She included Doud's salary in the estimated annual payroll. Patten submitted the completed application to the Bureau. The Bureau calculated the premiums based on the estimated annual payroll, then assigned and forwarded Doud's application to Fidelity & Casualty Company of New York (Fidelity). The policy issued to Doud by defendant, Fidelity, listed Garry Doud DBA K & G Janitorial Services as the insured and his legal status as "Individual." The policy did

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not have a sole proprietor endorsement attached nor did it specify that such an endorsement was a prerequisite for sole proprietor coverage.

On 1 June 1980 Doud was slightly injured while at work. He filed an Industrial Commission Form 19, "Employer's Report of Injury to Employee," with Underwriters Adjusting Company (UAC), the claim handling adjusters for Fidelity. UAC paid the claim for \$66.49 in medical expenses as a "medical only" claim without first checking the insurance policy.

In August 1980 Doud was hired by defendant Dancy Construction Company (Dancy) to clean the windows of a building under construction. While working on 15 September 1980, Doud fell from a ladder owned by Dancy and broke bones in both ankles. Fidelity denied Doud's workers' compensation claim for the 15 September 1980 accident, asserting that Doud's insurance policy did not cover him as the sole proprietor.

A Deputy Commissioner, after a hearing, concluded that the North Carolina Industrial Commission (Commission) lacked jurisdiction over Doud's claim. The Commission adopted as its own the Opinion and Award of the Deputy Commissioner. We refer, therefore, to the Commission's findings and conclusions.

II

Doud argues that the Commission erred in ultimately concluding that it lacked jurisdiction over his claim, after finding and concluding that (1) Fidelity had no notice of Doud's election; (2) Fidelity was not estopped to deny coverage by its payment of the June 1980 "medical only" claim; and (3) Doud was not in an employer-employee relationship with either Dancy or Dancy's subcontractor.

III

Ordinarily, to come within the provisions of the Workers' Compensation Act, a claimant has the burden of proving that an employer-employee relationship existed at the time of the injury. *Lucas v. Li'l General Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976); *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3 (1982); *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (1980). Although the Commission's findings of fact are generally con-

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clusive on appeal, if supported by competent evidence, the employer-employee relationship is a jurisdictional fact, on which the reviewing court has the duty to make its own finding, after reviewing all the evidence in the record. *Lucas; Durham; Lloyd; see McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E. 2d 456 (1982).

As stated earlier, the revised version of G.S. § 97-2(2) (1979 & Supp. 1983) enables a sole proprietor to be included as an employee under his business' workers' compensation coverage if (1) "he is actively engaged in the operation of the business," and (2) "the insurer is notified of his election." Therefore, in the case *sub judice*, Doud, a sole proprietor, had the burden of proving both (1) and (2) in order to come within the provisions of the Workers' Compensation Act as an employee. Since the sole proprietor's employee status is a jurisdictional fact, this Court has the duty to make its own independent finding, after reviewing all the evidence in the record. *Lucas; Durham; Lloyd*. Only the notice requirement is at issue here.

IV

[1] Doud contends that Fidelity is estopped to assert the notice requirement of G.S. § 97-2(2) to deny Doud coverage, because the application form put Fidelity on inquiry notice of Doud's election. We agree. We hold that Doud, a sole proprietor, successfully elected coverage as an employee under his workers' compensation policy and, therefore, the Commission has jurisdiction over his claim.

The doctrine of equitable estoppel comes into play when an insured, without knowledge of the true facts, detrimentally relies in good faith on an insurer's conduct. 16B J. Appleman and J. Appleman, *Insurance Law and Practice* § 9081 (rev. ed. 1981). That is, an insurer is estopped to deny workers' compensation coverage after a loss has been sustained, if the insurer treated the claimant as an employee in computing the premiums and accepted the resulting premiums based on the claimant's salary. *Pearson v. Pearson*, 222 N.C. 69, 21 S.E. 2d 879 (1942); *Aldridge v. Foil Motor Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964); *see also Garrett v. Garrett & Garrett Farms*, 39 N.C. App. 210, 249 S.E. 2d 808, *disc. rev. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). And all the law requires is that the insurer have actual or *constructive knowledge*

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of the true facts before the doctrine is applicable. 28 Am. Jur. 2d *Estoppel and Waiver* § 35, at 640 (1966); Appleman, *supra*, § 9081, at 496; § 9088, at 571-72. In *Aldridge, Pearson and Garrett*, the insurer's agent's actual knowledge was imputed to the insurer.

In the case *sub judice*, there is no dispute that Fidelity lacked actual knowledge of Doud's election. The absence of a sole proprietor endorsement with the issued policy supports Fidelity's ignorance. We need not decide whether Patten and Woody Clinard Insurance, Inc. acted as Fidelity's agents, since either Fidelity's membership in the Bureau or the Bureau's agency relationship with Fidelity put Fidelity on inquiry notice of Doud's election.

Fidelity argues that it did not attach the necessary endorsement to Doud's policy because his application did not notify Fidelity of his election; however, Doud's evidence reveals that the Bureau drafted the application form Doud completed in August 1977, several years before the July 1979 amendment. Consequently, the 1977 form did not contain a space to elect sole proprietor coverage. Doud's evidence further reveals that (1) the Bureau had not revised the 1977 form, as of April 1980, to reflect the 1979 amendment, and (2) the 1977 form was the standard form required by the Bureau for assigned risk workers' compensation insurance. Any attempt to notify the insurer had to be on an *ad hoc* basis. Fidelity's evidence, testimony by Thomas Haas, a commercial casualty underwriting manager with Fidelity, reinforces the haphazard notification methods bred of the outdated form.

Q. What's usually done to include [the] intent [to cover the sole proprietor]?

A. Well, the legal status *sometimes* shows individual and there it would show, include sole proprietor and coverage *sometimes*. Where they show the payroll, they will include sole proprietor to be included and indicate such payroll. [Emphasis added.]

Doud's application form put Fidelity on actual notice that Doud was a sole proprietor. Recognizing that

[b]efore an insurer can be charged with knowledge of facts available by investigation so as to constitute an equitable

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estoppel, there must be a reason or cause for further investigation, and the insurer must be *put upon inquiry [notice] by some fact or information in the insurer's possession[.]* (Emphasis added.)

16B J. Appleman, *supra* p. 4, § 9088, at 572 & n. 42, we conclude that Fidelity was put on inquiry notice that Doud, as a sole proprietor, had elected sole proprietor coverage, because (a) pursuant to N.C. Gen. Stat. § 58-124.18 (1982), Fidelity was a member of the Bureau and actively involved in its administration; (b) pursuant to N.C. Gen. Stat. § 58-124.17(5) (1982), the Bureau was Fidelity's agent; and (c) the Bureau, created by N.C. Gen. Stat. § 58-124.17 (1982), drafted the controverted application form in August 1977. Fidelity's membership and representation in the Bureau charged Fidelity with constructive knowledge by putting it in possession of the inquiry-triggering information.

Moreover, Fidelity had constructive knowledge of Doud's election, by virtue of its principal-agent relationship with the Bureau. " 'Agency' exists when one person is authorized to represent and act for another in dealings with third persons." *Lancaster's Stock Yards, Inc. v. Williams*, 37 N.C. App. 698, 703, 246 S.E. 2d 823, 827, *disc. rev. denied*, 295 N.C. 738, 248 S.E. 2d 863 (1978). The Bureau acts as Fidelity's exclusive agent for assigned risk workers' compensation insurance carriers in North Carolina.

As a prerequisite to the transaction of workers' compensation insurance in this State, every member of the Bureau that writes such insurance must file written authority permitting the Bureau to act in its behalf, as provided in this section, and an agreement to accept risks that are assigned to the member by the Bureau. . . .

N.C. Gen. Stat. § 58-124.17(5) (1982). As stated earlier, an agent's actual knowledge is imputed to the insurer. *Aldridge; Pearson; Garrett*. Significantly, the agent's constructive knowledge is also imputed to the insurer. 3 G. Couch, *Couch on Insurance* 2d § 26-145, at 688 (1980). Therefore, the Bureau and Fidelity, as its principal, had constructive knowledge of Doud's election.

We hold that Fidelity is estopped to deny Doud coverage as an employee, after treating Doud as an employee and accepting the benefits of that status, with constructive knowledge. *See*

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Aldridge; Pearson; Garrett; Couch, supra. We, therefore, need not consider whether Fidelity's payment of the June 1980 "medical only" claim constitutes a separate ground for estoppel. It is certainly further evidence of Doud's detrimental reliance. The policy itself, Fidelity's acceptance of the premiums and payment of the June claim lulled Doud into a false sense of security. Since we have validated Doud's election of coverage as an employee, we further hold that the Commission has jurisdiction over his workers' compensation claim.

V

[2] We go on to address Doud's third argument, that the Commission erred in finding and concluding that "Doud was not an employee of either Dancy or Dancy's subcontractor, K & G Janitorial Services, and therefore not covered under Dancy's workers' compensation policy." We conclude that the Commission did not err in dismissing Doud's claim for coverage under Dancy's policy, on jurisdictional grounds.

As discussed in III, *supra*, an employer-employee relationship at the time of the injury is a jurisdictional fact, for which the claimant has the burden of proof. *Lucas; Durham; Lloyd.* This Court has the duty to make its own findings on jurisdictional facts, after reviewing all the evidence in the record. *Lucas.*

G.S. § 97-2(2) defines an employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . . ." An employer-employee relationship does not exist if one party is an independent contractor, since an independent contractor is not an employee within the meaning of the Act. *Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495 (1970).

Some of the factors considered are whether: "[t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control

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over such assistants; and (h) selects his own time." *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944).

Reviewing Doud's evidence, we find that (1) Doud was the sole proprietor of K & G Janitorial Services, an independent business; (2) Doud testified that he contacted Dancy in August 1980 "to contract out, to contract for cleaning up when the construction was finished"; (3) Doud orally contracted to clean the windows for a lump sum; (4) Doud worked no set hours. There is no evidence that Dancy had the right to control the methods used. We conclude that Doud was an independent contractor at the time of his injury.

Doud argues further that Dancy's failure, as a contractor, to obtain a certificate from the Industrial Commission showing that Doud, the subcontractor, was insured, created liability for Doud's workers' compensation benefits pursuant to N.C. Gen. Stat. § 97-19 (1979). This statute is designed to protect the *employees* of a subcontractor, not the subcontractor himself. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965). The sole proprietor of a business cannot normally wear two hats—owner and employee. G.S. § 97-2(2) (1979 & Supp. 1983), as discussed *supra*, provides the sole exception. Dancy is not liable for Doud's benefits.

VI

In summary, we hold that the Commission has jurisdiction over Doud's workers' compensation claim based on Doud's election to be included as an employee under his own policy, pursuant to G.S. § 97-2(2) (1979 & Supp. 1983). For the reasons discussed above, Fidelity is estopped from asserting the statutory notice requirement to deny coverage. Doud, an independent contractor, is ineligible for coverage under Dancy's policy and, therefore, the Commission did lack jurisdiction over his claim on this theory.

Reversed in part and affirmed in part.

Chief Judge VAUGHN and Judge HILL concur.

Foy v. Foy

ELLAVENE M. FOY v. HOWARD J. FOY

No. 8326DC974

(Filed 19 June 1984)

**1. Divorce and Alimony § 21.3— failure to comply with alimony order
“willful”—sufficiency of evidence**

The evidence before the trial court was sufficient to support a finding that defendant's failure to provide alimony payments as provided by a judgment was willful where the evidence tended to show that defendant is a licensed electrical contractor; defendant's present wife is the legal owner of an electric company; defendant performs managerial services for that company; although defendant receives no salary directly from the company for his services, his wife receives both salary and profits which she in turn gives to defendant in the form of “support”; advertisements appearing in the telephone directory have listed defendant as the owner of the electrical company; in licensing renewal applications defendant has at various times referred to himself as “owner” and “manager” of the company; defendant began receiving social security benefits in the amount of \$411 per month in December 1982; defendant has an interest, shared with his wife, in two savings certificates in the amounts of \$2,626.91 and \$10,000, as well as in a home having a value of approximately \$88,000. This and other evidence introduced at trial provided ample support for the court's finding that defendant's failure to meet his alimony obligations of \$40 per week has been willful.

2. Divorce and Alimony § 21— order finding arrearages in alimony and finding contempt not in conflict with previous order

An order finding defendant to be in willful contempt of court and finding defendant in arrears on his alimony payments in no way varied or conflicted with an earlier order.

APPEAL by defendant from *Brown, Judge*. Order entered 28 April 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 6 June 1984.

This is an action on a consent judgment entered on 5 October 1970 pursuant to which defendant agreed to pay plaintiff the sum of \$40.00 per week as permanent alimony. On 8 February 1983 plaintiff filed a “motion for contempt and increase in alimony,” in which she asserted that defendant was in arrears on his alimony payments in the amount of \$25,380.00 plus interest. On 25 April 1983 defendant filed an answer and countermotion in which he denied the material allegations in plaintiff's motion and requested that the prior court order be modified “so as to eliminate or substantially decrease the defendant's alimony obligation.” The matter came on for hearing on 25 April 1983, and the court

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entered an order on 28 April in which it found defendant to be in willful contempt of the court order dated 5 October 1970. Judge Brown directed that defendant be committed to the Mecklenburg County Jail for thirty days, such term to be stayed upon defendant's compliance with certain specified conditions, including immediate payment of \$6,000.00 to the Clerk of Superior Court and payment of regular weekly sums thereafter. Because the parties had abandoned their motions for a modification of the amount of defendant's monthly alimony obligations, the court made no ruling in this regard. Defendant appealed.

Curtis, Millsaps & Chesson, by Joe T. Millsaps, for plaintiff, appellee.

Ellis M. Bragg for defendant, appellant.

HEDRICK, Judge.

We note at the outset defendant's failure to comply with Rule 28, North Carolina Rules of Appellate Procedure, in regard to the preparation of his brief. Counsel's failure to identify in the brief the assignments of error and exceptions forming the basis for questions presented renders the task of an appellate court more difficult, and the appeal subject to dismissal. Nevertheless, we turn to a consideration of the merits of the three questions argued by defendant on appeal.

[1] Defendant first contends that "the evidence before the trial Court was insufficient to support a finding that Mr. Foy's failure to comply with the Judgment of October 5, 1970 was 'willful.'" Examination of the judgment reveals the following finding of fact made by the trial court and excepted to by defendant:

34. That whether from the defendant's Social Security benefits alone, or from funds derived from his business over which he has control, the defendant has had the ability during each and every month after April of 1977 to have paid some amounts of the \$40.00 per week alimony obligations to the plaintiff and his failure to do so has been willful.

It is well-settled that findings of fact made by the court in contempt proceedings are conclusive on appeal if supported by any competent evidence in the record. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978). See also *Lee v. Lee*, 37 N.C. App. 371, 246

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S.E. 2d 49 (1978). Our examination of the record reveals ample support for Judge Brown's above-quoted finding of fact:

Defendant has been continuously licensed as an electrical contractor since 1946, and he is a "qualified person" as that term is defined by the State Board of Examiners of Electrical Contractors. Defendant's present wife, Diane Foy, is the legal owner of "Foy and Son Electric Company," for which defendant serves as the "qualified person" required by the rules and regulations issued by the State Board of Examiners. These regulations require that a "qualified person" supervise and direct all electrical work performed under his license, and that he be "regularly on active duty in the licensee's place of business." It is uncontroverted that defendant performs managerial services for Foy and son, and that he "looks at" various jobs performed by company employees. While Mr. Foy receives no salary directly from the company for his services, his wife, as legal owner and employee, receives both salary and profits, which she in turn gives to defendant in the form of "support." Furthermore, advertisements appearing in the telephone directory have listed defendant as the owner of Foy and Son, as did the Charlotte city directory for the years 1978 and 1980. In licensing renewal applications since 1977 defendant has at various times referred to himself as "owner" and "manager" of the company.

We think this and other evidence presented to the trial court provides ample support for the court's findings that defendant is the "actual owner" of Foy and Son, and that defendant has attempted to avoid his alimony obligations by "claiming legal ownership of his assets in his present wife." Even if we held this evidence insufficient to support such a finding, however, the result would be no different. The evidence establishes beyond peradventure that defendant has at all times since April, 1977, rendered services to the company which were essential to its operation, and for which defendant could have demanded direct and substantial compensation. Defendant's own testimony, taken as true, supports the court's finding that Mr. Foy has at all times had the ability to pay plaintiff the sum of \$40.00 per week, and that his failure to do so has been willful.

Apart from Mr. Foy's interest in Foy and Son, the record contains substantial evidence of other assets in which defendant

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has an interest. In December, 1982, defendant began to receive Social Security benefits in the amount of \$411.00 per month. Defendant's testimony revealed that no portion of this sum is required for his personal expenses, such expenses having been borne in the past by defendant's wife, by means of sums received at least in part from Foy and Son. Further, defendant has an interest, shared with his wife, in two saving certificates in the amounts of \$2,626.91 and \$10,000.00, as well as in a home having a value of approximately \$88,000. This and other evidence introduced at trial provides ample support for the court's finding that defendant's failure to meet his alimony obligations has been willful. This assignment of error is without merit.

[2] Defendant next assigns error to "the inquiry into matters prior to the Order of April 25, 1977 . . . in that the Order of April 25, 1977 was res judicata on all matters prior to that date." Defendant's reference is to an order entered by Judge Saunders on 22 April 1977, which held that defendant was indebted to plaintiff in the sum of \$13,940.00, but refused to find defendant in contempt "in that he has not had the means with which to comply with the prior Orders of this Court for the support of his wife." Defendant now contends that evidence regarding certain business and property dealings conducted by him prior to April 1977 was improperly admitted by Judge Brown, arguing that "[f]or the Court in the instant case to consider matters prior to April 22, 1977, in concluding that the Defendant was in contempt of Court as of April 28, 1983, is to nullify the specific provisions of the April 22, 1977 Order."

Defendant's contentions in regard to this argument are unpersuasive. It is important to note that the order appealed from found defendant to be indebted to plaintiff in the sum of \$12,560.00 "for the period of April 18, 1977 through Friday, April 29, 1983." Judge Brown's order in no way varied or conflicted with the order of April, 1977, which continues to be dispositive of the issues tried out before Judge Saunders, i.e., whether defendant should be held in contempt for failure to fulfill alimony obligations accruing prior to April, 1977. The 1977 order does not, contrary to defendant's contentions, render all evidence introduced at that hearing inadmissible at later hearings. Nor does it grant defendant permanent immunity from enforcement of his contrac-

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tual and legal obligations. The assignment of error is without merit.

Defendant's final argument raises the question of the sufficiency of the evidence to support numerous findings of fact made by the trial judge. We have carefully examined the record in relation to each of the challenged findings, and hold that each finding is adequately supported by competent evidence. While we see little to be gained by an exhaustive discussion of each challenged point, we note that many of the findings of fact which defendant has excepted to may be summed up in a single sentence: defendant has since April, 1977, deliberately attempted to secrete his assets so as to avoid his alimony obligations. Our examination of the evidence reveals overwhelming support for the court's findings in this regard. Indeed, the record before us demonstrates, in our opinion, that the defendant has too long successfully avoided his obligations under the legitimate orders of the court. The order appealed from is

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

INTERNATIONAL HARVESTER CREDIT CORPORATION v. HAROLD
ROSCOE BOWMAN AND BARBARA J. BOWMAN

No. 8326SC856

(Filed 19 June 1984)

1. Fraud § 5; Guaranty § 1— unreasonable reliance on misrepresentations

Defendant guarantors' reliance, if any, on alleged misrepresentations by plaintiff creditor's agent as to whether their guaranty extended to subsequent purchases was unreasonable as a matter of law since there was no fiduciary relationship between the creditor and guarantors, and since defendants were charged with knowledge of the contents of the written instrument which they signed. Furthermore, plaintiff's agent had no duty to "disclose" to defendants the clear terms of the guaranty.

2. Guaranty § 1— guaranty of present and future indebtedness— consideration

A guaranty extending to all obligations for which a corporation "is now or may hereafter become liable" was supported by consideration although plaintiff had extended credit to the corporation prior to defendants' execution of the guaranty.

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3. Guaranty § 2— guarantors' obligation not in dispute

The amount of defendant guarantors' obligation was not in dispute because of their allegations concerning the sale of the collateral for the debts which they guaranteed where the sale of the collateral was conducted pursuant to an order of a federal bankruptcy court, defendants have identified no specific flaw or defect in the manner in which the sales were carried out, and the actual deficiency yielded by the sale was more than twice the amount awarded by the bankruptcy court as a deficiency allowance.

4. Guaranty § 1— waiver of notice of sale of collateral

Defendant guarantors waived notice of the sale of collateral for the debts which they guaranteed by language in the guaranty agreement stating that they waived "all other notices of any kind whatsoever."

APPEAL by defendants from *Snepp, Judge*. Order entered 28 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 May 1984.

This is a civil action wherein plaintiff seeks to recover \$51,000.00 under a guaranty agreement executed by plaintiff and defendants on 3 October 1977. The record reveals the following:

Plaintiff, a North Carolina corporation, is a subsidiary of International Harvester Corporation. Defendant Harold Bowman is the former president and fifty-three percent stockholder in B & A Transport Company, Inc., a now bankrupt long-distance trucking company. Beginning in 1977 B & A Transport engaged in a series of transactions with plaintiff and its parent company, in which B & A purchased trucks from International Harvester Corporation and financed its acquisitions through plaintiff Credit Corporation by execution of numerous retail installment contracts. On 3 October 1977, defendants executed a guaranty in favor of plaintiff and its parent corporation, in which they guaranteed payment of all debts and obligations incurred by B & A Transport. On 23 January 1980 B & A Transport filed for bankruptcy, and has since that time failed to make regular payments to plaintiff as required by the installment contracts. The vehicles subject to the installment contracts were sold pursuant to order of the United States Bankruptcy Court, entered 8 May 1980. Sale of the vehicles produced a substantial deficiency, and on 20 October 1980 the bankruptcy judge entered an order declaring that plaintiff was entitled to a deficiency allowance of \$51,000.00. On 1 March 1981 plaintiff filed this action, seeking to recover \$51,000.00 from defendants pursuant to the guaranty.

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Defendants counterclaimed, asserting that their signatures on the guaranty were obtained by means of plaintiff's unfair and deceptive trade practices. On 28 March 1983 plaintiff's motion for summary judgment was granted, and defendants were ordered to pay plaintiff \$51,000.00 plus costs and attorney's fees. The court did not rule on defendants' counterclaim. Defendants appealed.

C. Eugene McCartha for plaintiff, appellee.

White and Crumpler, by David R. Crawford, for defendants, appellants.

HEDRICK, Judge.

We note at the outset that defendants' appeal is from an order "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and is thus premature. N.C. Gen. Stat. Sec. 1A-1, Rule 54(b), North Carolina Rules of Civil Procedure. Nevertheless, we choose to exercise our discretion to pass on the merits of defendants' appeal.

The thrust of defendants' argument on appeal is that summary judgment was inappropriate because of the existence of "multiple genuine issues of material fact" raised by the pleadings and supporting documents considered by the trial judge. We will examine each of these alleged "genuine issues" in turn.

[1] Defendants first contend that a genuine issue exists as to whether their execution of the guaranty was procured by the fraudulent acts of plaintiff's agent, and whether "plaintiff breached a duty . . . to reveal the material terms of the guaranty." In support of this argument, defendants contend that their subjective understanding of the guaranty was that their obligations extended only to the purchase of one truck, and not to all subsequent purchases made by B & A Transport. They further contend that they communicated this understanding to plaintiff's agent, who assured them that this was accurate. Finally, defendants point to the failure of plaintiff's agent to point out to them provisions of the guaranty directly contrary to this alleged misrepresentation.

We find defendants' argument in this regard entirely unpersuasive. The clear language of the guaranty, which defendants are

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presumed to have read and which defendants signed, in pertinent part provides:

The Undersigned, for a valuable consideration the receipt of which is hereby acknowledged, hereby guarantees payment, at maturity, of any and all indebtedness or obligations, whether primary or secondary, for which B & A Transport Co., Inc., of Mt. Airy, County of Surry and State of North Carolina, is now or may hereafter become liable or indebted to International Harvester Company or International Harvester Credit Corporation.

(Emphasis added.)

A person who executes a written instrument is ordinarily charged with knowledge of its contents, *Mills v. Lynch*, 259 N.C. 359, 130 S.E. 2d 541 (1963), and may not base an action for fraud on ignorance of the legal effect of its provisions, *Pierce v. Bierman*, 202 N.C. 275, 162 S.E. 566 (1932). While these rules do not apply to situations in which the person making the misrepresentations stands in a fiduciary relationship to the signing party, *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951), the relationship between a creditor and a guarantor is not such a relationship. In short, we hold that defendants' reliance, if any, on alleged misrepresentations made by plaintiff's agent was unreasonable as a matter of law. We further hold that plaintiff's agent had no duty to "disclose" to defendants the clear terms of the guaranty. The case relied on by defendants in support of their contention to the contrary involved a situation in which a creditor was allegedly aware of some fact that materially increased the guarantor's risk and which the creditor knew the guarantor probably would not discover. See *Trust Co. v. Akelaitis*, 25 N.C. App. 522, 214 S.E. 2d 281 (1975). The principles set out in this case have no application to the facts here presented.

[2] Defendants next contend that a genuine issue is presented as to whether the guaranty was supported by valid consideration. In this regard defendants make much of the fact that plaintiff had extended credit to B & A Transport prior to their execution of the guaranty. Because plaintiff's extension of credit was independent of the guaranty, defendants argue, the guaranty was without consideration and was thus unenforceable.

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It is true, as defendants assert, that a guaranty executed independently of the main debt must be supported by independent consideration. *Supply Co. v. Dudney*, 56 N.C. App. 622, 289 S.E. 2d 600 (1982). We do not agree, however, that the record discloses a genuine issue of material fact as to the existence of such independent consideration in the instant case. This Court has said that a guaranty of future as well as present indebtedness is supported by adequate consideration, *Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E. 2d 736, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981). We find *Gillespie* controlling on the facts before us, where the guaranty extends to all obligations for which B & A Transport "is now or may hereafter become liable." We note in further support of our ruling that plaintiff in fact extended credit to B & A Transport on several occasions after defendants' execution of the guaranty.

[3] Defendants also argue that summary judgment was improper because the amount of their obligation under the guaranty was in dispute. In support of this contention defendants set forth a number of allegations going to the sale of the collateral for the debts that they guaranteed. Specifically, defendants complain that they had no notice of the sale and that the sale was negligently conducted and was thus commercially unreasonable.

We find defendants' argument to be without merit for several reasons. First, we note that the sale of the collateral securing B & A Transport's debt was conducted pursuant to order of the United States Bankruptcy Court. Secondly, we note that defendants have, aside from general allegations, identified no specific flaw or defect in the manner in which the sales were carried out. Next, we note that the actual deficiency yielded by the sale was more than twice the amount awarded by the Bankruptcy Court as a deficiency allowance. Finally, we point out the language of the guaranty:

The Undersigned also agrees that the written acknowledgment of the debtor or the judgment of any court establishing the amount due from the debtor shall be conclusive and binding on the Undersigned. . . .

[4] In regard to defendants' argument that they were entitled to notice of the sale, we point out that defendants have found neither case nor statute in this State that supports their position.

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Furthermore, we turn once again to the clear language of the contractual agreement entered into by the parties:

The Undersigned hereby waives notice of the acceptance of this guaranty, notice of any and all indebtedness or obligations now existing or which may hereafter exist, notice of default of payment, demand and diligence, *and all other notices of any kind whatsoever.*

(Emphasis added.)

Our disposition of this case makes a discussion of defendants' remaining assignment of error unnecessary.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

IN RE: MICHAEL JOE ADCOCK AND DANNY WILSON ADCOCK, MINOR CHILDREN, H. GENE HERRELL, DIRECTOR OF THE UNION COUNTY DEPARTMENT OF SOCIAL SERVICES V. JOSEPH JOE ADCOCK, PHYLLIS KAY HELMS ADCOCK A/K/A PHYLLIS KAY HELMS ADCOCK PRESLEY AND LANNY WILSON PRESLEY A/K/A LANNY WILSON PRESSLEY

No. 8320DC985

(Filed 19 June 1984)

1. Parent and Child § 1.6— termination of parental rights— sufficiency of evidence that mother did not intervene when son abused

A trial court properly found that respondent mother was present on one or more occasions when her son was beaten with a belt by the man with whom she lived but did not intervene for her son's protection and did not report the same to appropriate authorities where there was clear and convincing evidence that the man with whom respondent mother lived abused her son Michael over a period of many months and that the respondent mother did not prevent this abuse.

2. Parent and Child § 2.3— termination of parental rights— relevancy of findings to issue of neglect

The trial court's findings dealing with respondents' failure to provide a stable living environment and proper food and clothing were clearly evidence of neglect, were relevant, and were supported by competent evidence.

In re Adcock

3. Parent and Child § 2.3— termination of parental rights—finding that children neglected—supported by evidence

A trial judge properly found and concluded that the two children involved in this appeal were neglected within the meaning of G.S. 7A-517(21) where the record is replete with evidence that the home environment was unstable and that respondents were indifferent to the children's physical welfare. Respondents moved approximately eight times within an eighteen-month period; the children were often found inappropriately dressed in their unheated trailer, and both children frequently had colds and other minor ailments; the homes were in disarray, and there was seldom food or heat in the trailer; respondents attended only 3 of 8 parenting skill classes; a psychological evaluation of one child indicated that the child was "anxious . . . with feelings of insecurity and . . . needs of dependency that have not been met"; and respondents left the children with a friend on various occasions for as long as two weeks without arrangements for food and clothing and without leaving any indication as to when they would return.

APPEAL by respondents Phyllis Kay Helms Adcock and Lanny Wilson Presley from *Honeycutt, Judge*. Order entered 21 April 1983 in District Court, UNION County. Heard in the Court of Appeals 6 June 1984.

This is a proceeding wherein petitioner, H. Gene Herrell, Director of the Union County Department of Social Services, seeks to terminate the parental rights of Phyllis Kay Helms Adcock, mother of the two minor children, Joseph Joe Adcock, father of Michael Joe Adcock, and Lanny Wilson Presley, father of Danny Wilson Adcock.

The Department of Social Services (hereinafter DSS) obtained custody of the minor children on 21 May 1982 and on 8 September 1982, DSS petitioned the court to terminate the parental rights of respondents.

Following a hearing the court made detailed findings of fact and reached the following conclusions of law:

1. That the respondents have neglected the children, Michael Joe Adcock and Danny Wilson Adcock, as defined by G.S. 7A-289.32(2).

2. That the respondent, Lanny Wilson Presley, has abused Michael Joe Adcock as defined by G.S. 7A-289.32(2).

3. That the respondent, Joseph Joe Adcock, has left the custody of Michael Joe Adcock with his mother, Kay Helms

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Adcock, for a period of in excess of one year prior to the filing of this petition and has willfully failed without justification to pay for the care, support, and education of said child as defined by G.S. 7A-289.32(6).

From an order terminating their parental rights, respondents Phyllis Kay Helms Adcock and Lanny Wilson Presley appealed.

Griffin, Caldwell, Helder & Steelman, P.A., by Jake C. Helder, for petitioner, appellee, Union County Department of Social Services.

Smith & Cox, by Ronald H. Cox, Guardian Ad Litem for Michael Joe Adcock and Danny Wilson Adcock, appellees.

Perry & Bundy, by H. Ligon Bundy, for respondents, appellants.

HEDRICK, Judge.

[1] In their first argument respondents contend that the trial court's findings of fact are not supported by the evidence. They argue that the finding that "Kay Helms Adcock was present on one or more occasions when Michael Joe Adcock was beaten with a belt by Lanny Wilson Presley, but did not intervene for her son's protection and did not report same to appropriate authorities," is not supported by sufficient evidence. While Michael Joe Adcock did testify that "[w]hen [Lanny Presley] hurt me, Mama tried to stop him but she wasn't able to," there was ample evidence that Michael was beaten more than one time over a period of several months, and that respondent mother continued to reside with Lanny Presley. One witness testified that she asked Kay Adcock about the beatings allegedly inflicted on Michael by Mr. Presley, and that Ms. Adcock responded that "she closed her ears when Lanny was whipping Michael." The evidence, while conflicting, is sufficient to support the finding that respondent mother did not intervene in the abusive conduct of Lanny Presley directed toward the child. There is clear and convincing evidence that Lanny Presley abused Michael over a period of many months and that the respondent mother did not prevent this abuse. It is settled law that nonfeasance as well as malfeasance by a parent can constitute neglect. *In re Thompson*, 64 N.C. App. 95, 306 S.E. 2d 792 (1983). This assignment of error is without merit.

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[2] Respondents next challenge the following findings of fact made by the trial court:

9. That Lanny Wilson Presley and Kay Helms Adcock have lived in various trailers from the birth of Danny Wilson Adcock through the time of the original custody order. In each trailer except one, they were living with friends or relatives and had no visible means of support. There was no heat in at least one trailer, and there was a broken window in the room used by Michael Joe Adcock which was never repaired while they lived there. Michael Joe Adcock was made to stay in the room for indefinite periods of time as punishment. Danny Wilson Adcock was often improperly clothed in the trailer with no heat, wearing only a wet diaper and with no other immediate supervision than from his brother, Michael Joe Adcock.

Respondents contend that some of the above findings of fact are irrelevant to the issue of neglect and that other findings, while relevant, are not supported by competent evidence. The findings contained in paragraph nine concern the conditions in which these children lived and are thus relevant to the issue of neglect. Although "[n]eglect may be manifested in ways less tangible," respondents' failure to provide a stable living environment and proper food and clothing are clearly evidence of neglect that cannot be ignored. *In re Apa*, 59 N.C. App. 322, 324, 296 S.E. 2d 811, 813 (1982). We have considered the evidence set out in the record and find it sufficient to support all the findings challenged by this assignment of error.

[3] Respondents next contend that the trial judge erred in concluding that the two children, Michael and Danny, were neglected within the meaning of N.C. Gen. Stat. Sec. 7A-517(21), which defines a "neglected juvenile" as:

A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

In re Adcock

The record contains ample findings supported by clear, cogent, and convincing evidence that respondents failed to provide "proper care" and "supervision" to the children and which reveal that Michael and Danny lived "in an environment injurious to [their] welfare." The record is replete with evidence that the home environment was unstable and that respondents have been indifferent to the children's physical welfare. The evidence discloses that respondents moved approximately eight times within an eighteen-month period. The children were often found inappropriately dressed in their unheated trailer, and both children frequently had colds and other minor ailments. One witness found the home in disarray, with "clothes, shoes, food, plates and glasses on the floor." Several times the witness found Danny dressed only in a wet diaper. She stated that "[t]here was seldom food or heat in the trailer."

There was also testimony by a psychologist that respondents attended only three of the eight parenting skills classes. At the classes they did attend, the psychologist noted that respondent mother was passive and that Mr. Presley was bitter toward Michael. This witness also testified that she had conducted a psychological evaluation of Michael; the results of this testing indicated that the child was "anxious . . . with feelings of insecurity and . . . needs of dependency that have not been met."

The evidence also indicated, and the court found as a fact, that respondents left the children with a friend on various occasions for as long as two weeks. On these occasions respondents made no arrangements for food and clothing for the children, and gave no indication as to when they would return.

We conclude that there was clear, cogent, convincing, and competent evidence to support the trial court's conclusion that the children were neglected as defined by N.C. Gen. Stat. Sec. 7A-517(21).

Finally, respondents contend that the court erred in denying their motion, made pursuant to North Carolina Rules of Civil Procedure, Rule 41(b), for involuntary dismissal and in terminating respondents' parental rights. Respondents contend that there was insufficient evidence to support the findings of fact and conclusions of law. We disagree.

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A finding of any one of the six statutory grounds enumerated in N.C. Gen. Stat. Sec. 7A-289.32 is sufficient to support an order terminating parental rights. In the instant case, the court based its order on G.S. 7A-289.32(2), which provides as one ground for termination a finding that:

2. The parent has abused or neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21).

We need not repeat the evidence adduced at trial showing that Michael and Danny did not receive proper care and supervision and that the homes in which they lived were injurious to their welfare.

Although severing parental ties is a harsh judicial remedy, the best interests of the children must be considered paramount. The totality of the evidence presented was plenary, clear, cogent, and convincing that respondents had neglected the minor children. The evidence, findings of fact, and conclusions of law support the order terminating respondents' parental rights.

For these reasons, we affirm.

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

EVELYN W. LATTIMORE v. FISHER'S FOOD SHOPPE, INC.

No. 8310SC737

(Filed 19 June 1984)

Landlord and Tenant § 13.2— indefinite renewals in lease—summary judgment for plaintiff improper

In an action on a lease agreement, the trial court erred in granting plaintiff's motion for summary judgment finding that defendant had the absolute right to only one five-year renewal with subsequent renewals only by mutual consent and in denying defendant's motion for summary judgment where the language of the lease agreement clearly created a right to unlimited successive renewals by referring to "each successive five-year term," instead of a second

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five-year term, and by stating that the lease "shall be automatically renewed for successive five-year terms . . . unless the Tenant gives to Lessor in writing notice on or before ninety (90) days prior to the end of any five-year term."

APPEAL by defendant from *Brewer, Judge*. Judgment entered 19 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 7 May 1984.

This is an action on a lease agreement for property owned by plaintiff. Plaintiff had assisted her husband in operating a general merchandise store and service station on the premises until her husband's death in 1974. In 1975, plaintiff and defendant corporation entered into negotiations for defendant corporation to lease the premises. After some discussion, plaintiff instructed her attorney to confer with defendant corporation's president and then to draft a lease agreement.

On 5 March 1975, plaintiff, her attorney, and defendant corporation's president went over the proposed lease agreement, each party suggesting some changes. At that time, plaintiff and defendant corporation's president signed a bill of sale to transfer cash registers, merchandise, and other property to defendant, and defendant paid plaintiff \$23,000.00 for those items. Plaintiff's attorney later returned with the lease agreement as he had revised it. He asked plaintiff to read it, but she declined and signed the lease agreement without reading it. Defendant corporation's president subsequently signed the lease agreement.

Defendant took possession in March of 1975 and began to repair and substantially improve the premises. Within the first five months from the beginning of the Lease Agreement, defendant added a shed to the building, replaced the shelving in the store, installed a refrigerator container for soft drinks and produce, and installed an upright freezer, at a total cost of more than \$23,000.00. Defendant also added more gasoline pumps and underground storage tanks, replaced the building's electrical system, and replaced old refrigeration units.

Approximately three years after the lease agreement was signed, a dispute arose between plaintiff and defendant corporation as to the meaning of paragraph 9 of the lease agreement concerning renewal. It reads:

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9. This lease shall be automatically renewed for successive five-year terms, at the increased rentals provided hereinabove, unless the Tenant gives to Lessor in writing notice on or before ninety (90) days prior to the end of any five-year term; and each renewal shall, except for increased rental, be upon the same terms and conditions of this lease. This lease may be terminated by the Tenant upon the giving of the written 90-days notice to the Lessor, immediately prior to the end of a five-year term.

Plaintiff contends that the effect of this language is to give defendant corporation the absolute right to one five year renewal, with subsequent renewals only by mutual consent. Defendant corporation contends that this language gives it the right to renew the lease for unlimited successive five year terms as long as defendant's obligations under the lease agreement are satisfied.

Plaintiff filed this action in December of 1979, seeking, *inter alia*, a declaratory judgment that the lease agreement does not give defendant a perpetual right to renew. Defendant corporation filed its answer and counterclaim seeking a declaratory judgment that the terms of the lease agreement grant to defendant corporation unlimited successive five year renewal terms or in the alternative, judgment for \$23,405.10 for improvements and repairs to the premises made by defendant.

In April of 1980, the trial court, on motion by defendant, dismissed plaintiff's alternative claims (seeking reformation and a declaration that the lease was a nullity). The trial court denied defendant's motion to dismiss plaintiff's action for declaratory judgment.

In July of 1982, the trial court granted plaintiff's motion for summary judgment, finding that defendant had the absolute right to only one renewal term, and denied defendant's motion for summary judgment. Defendant appealed; plaintiff appealed from dismissal of her alternative claims.

Manning, Fulton & Skinner, by Michael T. Medford, for plaintiff-appellee.

Boxley, Bolton & Garber, by Ronald H. Garber, for defendant-appellant.

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EAGLES, Judge.

Defendant assigns as error the trial court's granting summary judgment to the plaintiff. Defendant contends that the lease agreement provides by its express terms that defendant has the right to unlimited successive renewals and that summary judgment in favor of plaintiff was therefore inappropriate. We agree.

A motion for summary judgment is properly allowed only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). We find the trial judge here erred in concluding as a matter of law that the lease agreement created "an absolute right in the defendant to renew said lease for one and only one renewal term of five years. . . ."

North Carolina courts follow the majority view that the law does not favor perpetual leases and that the intention to create one must appear "in clear and unequivocal language." This court has said:

(A) lease will not be construed to create a right to perpetual renewal unless the language employed indicates clearly and unambiguously that it was the intention and purpose of the parties to do so. . . . Moreover, leases providing for successive renewals, without other qualifying language, will be construed as providing for but one renewal.

Oglesby v. McCoy, 41 N.C. App. 735, 739, 255 S.E. 2d 773, 776, *rev. denied*, 298 N.C. 299, 259 S.E. 2d 301 (1979). The question before the trial judge here was whether there was clear and unambiguous language in this lease agreement indicating that the intention and purpose of the parties was to create for defendant the right to unlimited successive renewals. We hold that the language of the lease agreement clearly creates a right to unlimited successive renewals and that, therefore, summary judgment in favor of plaintiff was not appropriate.

Under this lease agreement, plaintiff has no right to terminate the lease unless defendant violates any of the terms of the agreement. The language in the lease agreement providing a rent increase in successive renewal terms indicates unlimited renewals:

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Eight Hundred (\$800.00) Dollars per month, payable on the first day of each and every month, in advance, for and during the first five-year term; and for and during each successive five-year term thereafter an additional sum of One Hundred (\$100.00) Dollars per month, in advance and cummulatively, [sic] for so long as this lease agreement shall continue; the intent of the agreement being that the rental shall increase by \$100.00 per month each five-year term over the previous five-year term.

By referring to "each successive five-year term," instead of "the second five-year term," in this language providing for rent increases, and by the paragraph 9 language that the lease "shall be automatically renewed for successive five-year terms . . . unless the Tenant gives to Lessor in writing notice on or before ninety (90) days prior to the end of any five-year term," the lease agreement here clearly and unambiguously provides for automatic renewal of successive five year terms unless defendant takes affirmative action *not* to renew the lease. Therefore, the trial judge erred (1) in concluding, as a matter of law, that the lease agreement here was for a term of five years with an absolute right in the defendant to renew for only one renewal term and granting plaintiff's motion for summary judgment and (2) in denying defendant's motion for summary judgment.

Reverse summary judgment in favor of plaintiff and remand for entry of summary judgment in favor of defendant.

Chief Judge VAUGHN and Judge BRASWELL concur.

GLENN A. SHATLEY STOLTZ v. ELVIN O. BURTON

No. 8321SC491

(Filed 19 June 1984)

1. Rules of Civil Procedure § 56.6— summary judgment in negligence cases

While summary judgment is generally not appropriate in negligence cases, it is appropriate in cases in which it appears that the plaintiff cannot recover even if the facts as alleged by the plaintiff are true. G.S. 1A-1, Rule 56(c).

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2. Negligence § 53.8— duty of shopping center owner to patron

A shopping center owner has a duty to exercise ordinary care to maintain the premises in a safe condition and to warn invitees of hidden dangers or unsafe conditions discoverable by the owner through reasonable inspection and supervision.

3. Negligence § 49— State Building Code provision—inapplicability to sidewalk drop-off

Provision of the State Building Code requiring stairway treads and risers not to exceed seven and three-fourths inches did not apply to the height of a drop-off from a shopping center sidewalk to the parking lot.

4. Negligence § 49— increase in height of shopping center sidewalk—no negligence

A shopping center owner was not negligent in constructing and maintaining a sidewalk encircling the building which, because of the natural slope of the land, gradually increased in height from the parking lot.

5. Negligence § 49— variance in height of shopping center sidewalk—no hidden danger

There was no hidden danger in varying the height of a shopping center concrete sidewalk from the black asphalt parking lot, and the shopping center owner was not under a duty to warn a patron of such obvious condition.

APPEAL by plaintiff from *William Z. Wood, Judge*. Judgment entered 25 February 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 March 1984.

E. Vernon F. Glenn and David P. Shouvin, for plaintiff appellant.

Bell, Davis & Pitt, P.A., by William Kearns Davis, for defendant appellee.

BECTON, Judge.

I

We have been asked to decide whether the trial court erred in allowing the defendant's summary judgment motion in this negligent maintenance of property action. For the reasons that follow, we affirm.

II

Plaintiff, Glenna Shatley Stoltz, seeks to recover damages for injuries she sustained when she fell while leaving the defendant's, Elvin O. Burton's, premises, Oakwood Stratford Shopping Center.

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Stoltz entered the shopping center only a few feet from the point where she sustained injuries upon leaving. Stoltz alleges (1) that the gradually sloping sidewalk and parking lot resulted in the dangerously and latently defective step where she was injured; (2) that Burton was negligent in constructing and maintaining this step; and (3) that Burton was negligent in failing to warn her of the hidden dangers presented by the step when he knew, or should have known, of the dangers.

Burton first denies any negligence, and secondly contends that Stoltz was contributorily negligent in failing to see, through the exercise of ordinary care, the obvious and unconcealed concrete sidewalk step leading to the black asphalt parking lot. Further, Burton argues that the variation in color and dimension should have put any reasonable person on notice of the step down. Visibility was clear that day; nothing obstructed Stoltz's view.

After considering testimony, affidavits, exhibits (photographs of the step construction and the slope of the parking lot), and depositions, the trial court granted Burton's motion for summary judgment. Stoltz appeals.

III

[1] On motions for summary judgment, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, must show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983); *Stanley v. Walker*, 55 N.C. App. 377, 285 S.E. 2d 297 (1982). The moving party has the burden of establishing the absence of any triable issue of fact. *Brenner v. Little Red Schoolhouse, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981). While summary judgment is generally not appropriate in negligence cases, it is appropriate in cases in which it appears that the plaintiff cannot recover even if the facts as alleged by the plaintiff are true. *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 307 S.E. 2d 412 (1983); *Cox v. Haworth*, 54 N.C. App. 328, 283 S.E. 2d 392 (1981).

A *prima facie* case of negligence requires proof that: the defendant had a duty of care; the defendant breached that duty;

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the breach was the actual and proximate cause of plaintiffs injury; and damages resulted from the injury. *Frendlich*. Negligence is not presumed from the mere fact of injury.

[2] An invitee is a person who visits premises at the owner's express or implied invitation for their mutual benefit. *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E. 2d 583 (1981). A shopping center owner has a duty to exercise ordinary care to maintain the premises in a safe condition and to warn the invitee of hidden dangers or unsafe conditions, discoverable by the owner through reasonable inspection and supervision. *Green v. Wellons, Inc.*, 52 N.C. App. 529, 279 S.E. 2d 37 (1981); *see also Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981); *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978). But a shopping center owner is not an insurer, and is not required to warn invitees of obvious conditions. *See Hunt v. Montgomery Ward and Co., Inc.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). In the instant case, Burton owed Stoltz a store owner's duty of care. Stoltz was an invitee; she was present at the shopping center to purchase items from one of Burton's retail merchants.

[3] Stoltz attempts to invoke the North Carolina State Building Code (1978) (Code) to establish Burton's negligence. We are not persuaded.

Stoltz relies specifically on Section 1115.3, the provision governing stairway construction, which requires that treads and risers not exceed seven and three-quarters inches. Since Stoltz stepped down at an area which exceeded seven and three-quarters inches, she alleges that Burton violated the Code by his failure to construct steps in conformity with the Code and, by so doing, was negligent *per se*. We disagree.

It is well established in North Carolina that a violation of a safety statute is negligence *per se*. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (1966). However, the Code specifically addresses stairway construction and means of egress, not "steps" as construed by Stoltz. "A 'means of egress' is a continuous and unobstructed path of travel from any point in a building or structure to a public way" N.C.S.B.C. § 1102. The Code defines the exit discharge portion of the "means of egress" to include "stairs, ramps, bridges, balconies, escalators, moving walks and other components of an exit discharge. . . ." N.C.S.B.C. § 1112.1

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(d). It requires that all stairs not exceed seven and three-quarters inches. It makes no reference to drop-offs from sidewalks to parking lots.

[4] Burton's sidewalk is a part of the shopping center's foundation. This sidewalk encircles the building and provides a level base for the building on hilly terrain—the land slopes naturally downward. As a result, there is a gradual increase in the height of the sidewalk from one end of the building to the other. Building a level sidewalk was the only sure method of providing an even foundation for the shopping center, under the circumstances. It would be unjust and extremely burdensome to require such contracting owners to grade the entire tract of land, including the hilly parking lot, in an attempt to ensure a perfectly even drop-off from the sidewalk to the parking lot at all points. The varying height of the drop-off is a natural result of the particular tract, and Burton used proper care in constructing the sidewalk. Therefore, Burton was not negligent in the construction and maintenance of the sidewalk.

IV

[5] Stoltz argues that Burton was negligent in failing to warn her of the hidden dangers presented by the step. Because the evidence failed to show a hidden danger, we conclude that Burton did not breach his duty of care.

Frendlich controls the case *sub judice*. In *Frendlich*, plaintiff fell when she failed to see a second curb outside the defendant's store. Four feet from the store entrance was the first curb which, due to the slope of the street, varied in height. Plaintiff safely negotiated the first curb, but fell and struck a car when she failed to see the second curb at the street. Plaintiff testified that she was unfamiliar with the area and did not see the second curb because she was looking straight ahead. Plaintiff "alleged that defendant was negligent in maintaining a double curb at the entrance of its store and in failing to post signs or warning instructing patrons of the danger presented by the double curb when it knew, or should have known, that the double curb would or could be unfamiliar to patrons or not readily visible to patrons. . . ." *Frendlich*, 64 N.C. App. at 333, 307 S.E. 2d at 413. This Court rejected plaintiff's contentions and held that the defendant had no duty to warn plaintiff of the obvious condition since (1) the curb

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was in plain view in broad daylight; (2) plaintiff's view was unobstructed; (3) defendant did nothing to distract plaintiff's attention; and (4) plaintiff simply failed to focus attention on the curb.

Our Supreme Court has also stated that "if [a] step is properly constructed and well lighted so that it can be seen by one entering or leaving the store, by the exercise of reasonable care, then there is no liability." *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 159, 108 S.E. 2d 461, 467 (1959) (quoting *Tyler v. F. W. Woolworth Co.*, 181 Wash. 125, 128, 41 P. 2d 1093, 1094 (1935)). In *Garner*, the weather was clear, the entryway was not crowded, and only a few people were on the sidewalk. This Court decided that the slope of the entryway and sidewalk and the drop-off of varying height at the sidewalk did not alone constitute negligence. Further, because the step was obvious, being in plain view in broad daylight, the defendant had no duty to warn or to provide handrails.

In the case *sub judice*, Stoltz had a full and unobstructed view of the sidewalk "step" during broad daylight. She used the same sidewalk to enter and exit the shopping center, even though she entered a few feet from where she exited. In leaving the premises, Stoltz followed her shopping companion who had, only moments before, used the same step. Stoltz could have noticed her companion's height diminish as she stepped from the sidewalk. Instead, Stoltz looked straight ahead and fell from the sidewalk to the parking lot. Burton had no duty to warn Stoltz of the obvious condition. If anything, Stoltz behaved negligently by not exercising due care to protect herself.

V

We conclude that Stoltz has failed to show any negligence by Burton. The judgment of the trial court is

Affirmed.

Judges WEBB and EAGLES concur.

Glassco v. Belk-Tyler

KAY E. GLASSCO, EMPLOYEE v. BELK-TYLER COMPANY OF GOLDSBORO, NORTH CAROLINA, INC., EMPLOYER, AND HOME INSURANCE COMPANY, CARRIER

No. 8310IC1038

(Filed 19 June 1984)

Master and Servant § 62.1— workers' compensation—department store employee—fall in mall parking lot while going from car to work site—injury arising from risk common to neighborhood

Pursuant to *Barham v. Food World*, 300 N.C. 329 (1980) and G.S. 97-2(6), the Industrial Commission correctly concluded that plaintiff's injury did not arise out of and in the course of her employment in that her injury arose from a risk common to the neighborhood at a time when she was performing no duties for her employer on premises which were neither owned nor maintained or controlled by her employer and where plaintiff's accident occurred when she tripped over a median while walking toward defendant's store. Although plaintiff parked in a parking spot designated for employees of defendant store, defendant had nothing to do with the development of the parking plan, which was done solely by the mall owner, and defendant had no responsibility for the maintenance or upkeep of the designated parking area.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 17 August 1983. Heard in the Court of Appeals 8 June 1984.

George R. Kornegay, Jr., P.A., by George R. Kornegay, Jr. and Janice S. Head, for plaintiff-appellant.

Hedrick, Eatman, Gardner, Feerick & Kincheloe, by Scott M. Stevenson, for defendant-appellees.

HILL, Judge.

The question presented by this appeal is whether plaintiff's injury by accident arose out of and in the course of her employment, thereby enabling her to recover compensation under the Workers' Compensation Act. The Commission ruled that the injury by accident did not so arise. We affirm for the reasons that follow.

Plaintiff, a salesperson for defendant at its Berkeley Mall Shopping Center store in Goldsboro, North Carolina, arrived in the mall parking lot at approximately 12:20 p.m. to begin work at 1:00 p.m. She parked her automobile in an area in the mall park-

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ing lot designated for Belk store employees by the mall owners. As she walked toward defendant's store, she tripped over a median, injuring herself.

Before arriving at the mall parking lot, plaintiff had purchased a sandwich at a fast-food restaurant outside the Berkeley Mall Shopping Center. She had planned to eat the sandwich in the store kitchen before clocking in for work at approximately 12:55 p.m.

Defendant leased space for its store in the mall from Capitol Funds, Inc., the mall owner. According to the terms of the lease, store employees were entitled to use the common areas, including the parking areas. The landlord retained control over the common areas, including the right to adopt rules and regulations regarding the use of the parking areas by customers and employees. Pursuant to this power, the landlord formulated and furnished a master parking plan designating certain areas for the employees of mall tenants to park.

Plaintiff had been personally advised by her employer what area was designated as parking for Belk employees. In addition, a map indicating the areas where Belk employees were to park was posted over the time clock. She testified she had been admonished for parking in the wrong area previously.

These parking areas, however, were not marked, nor contained any signs to indicate to the general public that the area was designated for parking for store employees. Defendant's store manager testified that any customer could park in the area designated for Belk store employees. Belk employees could likewise park in areas of the mall parking lot designated for employees of other stores. Defendant had nothing to do with the development of the master plan for parking, which was done solely by the mall owner. Belk had no responsibility for the maintenance or upkeep of the designated parking area. That responsibility belonged to the mall owners.

In denying compensation, the Commission, adopting the Opinion and Award of the deputy commissioner, found and concluded that the plaintiff's injury did not arise out of and in the course of her employment in that her injury arose from a risk common to the neighborhood at a time when she was performing no duties

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for her employer on premises which were neither owned nor maintained or controlled by her employer. The Commission stated it could not distinguish *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980), which was controlling.

Barham is remarkably similar to the present case. There the plaintiff, an employee of a store leasing space in a shopping center, slipped and fell on ice in the loading zone located in front of her employer's store as she was walking to her work site. Under the lease the defendant-employer was given access to all spaces at the shopping center for its employees' and customers' use. The plaintiff and fellow employees had been notified to park away from the store. In reversing an award of compensation, our Supreme Court emphasized the fact that the defendant-employer neither owned nor leased the parking lot or the loading zone and had no responsibility for the maintenance or upkeep of those areas. It had no authority under the lease to instruct drivers not to park in any particular area. The parking lots and loading zone were common areas to which all stores had access for the convenience of their customers. The Court thus held that the parking lot and loading zone were not sufficiently under the control of the defendant-employer so as to be part of the employment premises. In addition, the plaintiff failed to show that she was performing any duties for her employer at that time or that she was exposed to a greater risk than that of the public generally. Accordingly, the Court held that plaintiff's injury did not arise out of or in the course of plaintiff's employment and thus did not qualify for workers' compensation under G.S. 97-2(6).

We also cannot distinguish *Barham* from the present case. Nothing in the present case indicates defendant owned or leased the parking area. In fact, the lease expressly provides:

11. Tenant hereby dedicates and grants to Tenant, its employees, suppliers, customers and invitees, a non-exclusive right at all times to use free of charge during the term of this lease or any extensions thereof, all the common areas, which areas are acknowledged to be for the use of such persons . . . for parking and for ingress and egress . . . (Emphasis added.)

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The uncontradicted evidence showed the defendant had no responsibility for maintenance or upkeep of the parking area. That responsibility belonged to the landlord. Mall customers and employees of other stores could park in the designated area, and defendant's employees could park in other designated areas. Plaintiff was performing no duties for her employer at the time of the accident and she was not exposed to a greater risk than that of the public generally.

Since plaintiff has not shown she sustained her injury by accident on her employer's premises, or that she is entitled to compensation under an exception to the premises rule, we hold the Commission properly found and concluded that the plaintiff did not sustain an injury by accident arising out of and in the course of employment, and therefore did not qualify for compensation under the Workers' Compensation Act. *Barham, supra*; G.S. 97-2(6). The Opinion and Award of the Industrial Commission is

Affirmed.

Judges BECTON and BRASWELL concur.

LOUISA A. BLACKWELL v. I. G. MASSEY, EXECUTOR OF THE ESTATE OF MARY PENNINGTON, NANNIE CROCKETT AND ANDREW WILSON, JR.

No. 8319SC363

(Filed 19 June 1984)

1. Rules of Civil Procedure § 4— personal jurisdiction— valid issuance of alias or pluries summons

That an original summons was not endorsed within 90 days of its issuance and no alias or pluries summons was issued within that time as G.S. 1A-1, Rule 4(d)(1) and (2) requires, did not invalidate the service that was subsequently accomplished. Pursuant to G.S. 1A-1, Rule 4(e) the case against defendant was discontinued and begun again by the valid issuance of an alias and pluries summons. However, even if the service had been defective or not accomplished at all, the courts acquired jurisdiction over defendant when defendant generally appeared in the case by moving for a change of venue, by filing answers to both the complaint and amended complaint, by responding to plaintiff's motion for summary judgment, by filing three different motions or amended motions of her own for summary judgment, by moving or requesting on several different occasions that the case be calendared for trial, and by participating in the summary judgment hearing. G.S. 1-75.7(1).

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2. Rules of Civil Procedure § 56.2— summary judgment—movant meeting burden of proof—failure of defendant to submit evidence contrary

Where plaintiff established by affidavits that she owned the land involved and that the purported deed from her that defendant relied upon was neither signed nor authorized by her, and thus was without legal force and effect, and where defendant submitted no evidence contrary thereto and did not undertake to undermine plaintiff's case by submitting evidence that would impeach or cast doubt upon the credibility of any of plaintiff's evidence, or indicate to the court by affidavit, as Rule 56(f) permits, that evidence contradicting or undermining plaintiff's position did exist and could be presented at a later time, the trial court properly entered summary judgment for plaintiff.

APPEAL by defendant Crockett from *Albright, Judge*. Judgment entered 14 December 1982 in Superior Court, ROWAN County. Heard in the Court of Appeals 5 March 1984.

Louisa A. Blackwell instituted this action to cancel a purported deed of hers dated in 1942 and recorded 20 January 1953, which undertook to convey a certain house and lot to her deceased sister, Mary Pennington, who died in 1978 leaving a will that devised the property to defendant Crockett. Plaintiff's complaint alleged that the purported deed was a forgery and that Mary Pennington's only connection with or interest in the property was that she was permitted by the plaintiff to live in the house rent free as long as she lived. Louisa A. Blackwell died subsequent to the institution of this action and with the court's approval her children filed an amended complaint as successor plaintiffs, but no order substituting them as plaintiffs is in the record, and the style of the case has not been changed.

In her answers to the complaint and amended complaint, defendant Crockett denied the material allegations and asserted that she is the fee simple owner of the property because of the deed and will. Each party then moved for summary judgment.

Plaintiff's motion was supported by the following:

- (1) An affidavit executed by Louisa A. Blackwell before her death saying that she did not sign the deed conveying the land to Mary Pennington.
- (2) An affidavit from a handwriting expert that the signature on the deed was not that of Louisa A. Blackwell.
- (3) An affidavit from Lucille Witherspoon stating that (a) she had personal knowledge of the arrangement between

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Blackwell and Pennington and Blackwell allowed Pennington to live on the property rent free for life; and (b) she was familiar with the signature of Blackwell and the signature on the deed was not that of Louisa A. Blackwell.

- (4) An affidavit from Milas Partee stating that he was familiar with the signature of Louisa Blackwell and the signature on the deed was not hers.
- (5) An affidavit from Rose Sanders stating that she witnessed the execution of Louisa A. Blackwell's affidavit.

Defendant's motion was supported only by her answers to the complaint and amended complaint, which pleadings, though verified, stated no facts disputing plaintiff's evidence that the signature on the deed was forged and defendant Crockett's predecessor in interest had occupied the property only with Louisa A. Blackwell's permission. Judge Albright denied defendant's motion and granted plaintiff's motion.

Plumides, Plumides and Caudle, by Michael G. Plumides, for plaintiff appellee.

J. H. Rennick for defendant appellant Nannie Crockett.

PHILLIPS, Judge.

[1] Defendant contends that the court had no jurisdiction over her person because service of process on her was not in compliance with the provisions of Rule 4 of the N.C. Rules of Civil Procedure. Though this question was not raised below, an attack upon the court's jurisdiction is always timely and we will consider it. The basis for her contention is that though the original summons was issued on 18 January 1979, it was never endorsed, and the alias and pluries summons, eventually served on her 30 August 1980, was not issued until 27 August 1980. That the original summons was not endorsed within ninety days of its issuance and no alias or pluries summons was issued within that time, as Rule 4(d)(1) and (2) requires, did not invalidate the service that was subsequently accomplished, however; as Rule 4(e) provides, it merely discontinued the case against her until it was, in effect, begun again by the valid issuance of the alias and pluries summons. Thus, the court has had personal jurisdiction over de-

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fendant ever since service was accomplished on 30 August 1980. But even if the service had been defective or not accomplished at all, for that matter, the defendant's contention would still be without merit. Because bringing parties into court by process is not the only way courts acquire jurisdiction over them; another time honored, equally efficacious mode of acquiring jurisdiction over defendants is their voluntary appearance in court for any purpose other than to specially challenge the court's jurisdiction. G.S. 1-75.7(1). And in this instance, according to the record, defendant *generally* appeared in the case by moving for a change of venue from Mecklenburg County to Rowan, by filing answers to both the complaint and amended complaint, by responding to plaintiff's motion for summary judgment, by filing three different motions or amended motions of her own for summary judgment, by moving or requesting on several different occasions that the case be calendared for trial, and by participating in the summary judgment hearing.

[2] The plaintiff, as the moving party for summary judgment under Rule 56 of the N.C. Rules of Civil Procedure, had the burden of proof, *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975), and rarely is it proper to enter summary judgment in favor of the party having the burden of proof. Because, as was pointed out in *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976), any gap or failure in the movant's proof, any evidence by the opponent that contradicts an essential element of the movant's claim, any evidence that impairs the credibility of any material part of the movant's evidence, or even any good faith indication by the opponent under Rule 56(f) that proof contradicting or undermining the movant's case, though not then available, does exist and can be presented within a reasonable time, requires that the motion be denied. Nevertheless, when a party moves for summary judgment on a claim and properly supports all the essentials of that claim with evidence, it falls to the opposing party to present contradictory evidence or to show by facts that the movant's evidence is insufficient or unreliable. Rule 56(e). And when the opposing party fails to do that and it plainly appears from the pleadings and evidence presented that the movant is entitled to recover on the claim, summary judgment is proper. Rule 56(c); *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). In this instance, however, though plaintiff established by affidavits that Louisa A. Blackwell

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owned the land involved and that the purported deed from her that defendant relies upon was neither signed nor authorized by her, and was thus without legal force and effect, defendant submitted no evidence contrary thereto. Nor did she either undertake to undermine plaintiff's case by submitting evidence that would impeach or cast doubt on the credibility of any of plaintiff's evidence, or indicate to the court by affidavit, as Rule 56(f) permits, that evidence contradicting or undermining plaintiff's position does exist and could be presented at a later time. In opposition to plaintiff's evidence, defendant's sole and only support was the verified denial upon "information and belief" of the forgery allegations in the complaint. This was not sufficient to rebut affidavits based on personal knowledge, *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), and since no excuse was offered for defendant's failure of proof, and the court was given no reason to believe that her position in the case would ever be stronger than it then was, judgment against her was correctly entered.

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

WILLIE GENE GADSON v. MARY BLACK TONEY

No. 8321DC918

(Filed 19 June 1984)

Trover and Conversion § 2— claim for conversion—summary judgment for defendant inappropriate

In a civil action where plaintiff sought to recover the sum of \$7,000 which defendant allegedly wrongfully converted to her own use, the trial court erred in granting summary judgment for defendant where the evidence, considered in the light most favorable to the plaintiff, was sufficient to raise an inference that plaintiff was the owner of money in a joint account and that defendant wrongfully assumed and exercised the right of ownership over that property to the exclusion of plaintiff's rights as owner.

APPEAL by defendant from *Alexander, Judge*. Order entered 14 April 1983 in District Court, FORSYTH County. Heard in the Court of Appeals 4 June 1984.

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This is a civil action wherein plaintiff seeks to recover the sum of \$7,000.00 which defendant allegedly wrongfully converted to her own use. Evidence introduced by plaintiff at trial tended to show the following:

Some time prior to 8 July 1982 plaintiff obtained the sum of \$17,500.00 in settlement of a claim arising out of an automobile accident. Following payment of medical bills, legal fees, and other expenses, approximately \$7,700.00 remained. Plaintiff's attorney, Mr. Mark Rabil, testified that he was concerned for a number of reasons about plaintiff's ability "to deal with" such a large sum of money. Defendant, who owns and operates a boarding house in which plaintiff lived, was known to and trusted by both plaintiff and Mr. Rabil, and Mr. Rabil thus suggested that plaintiff sign a power of attorney in favor of defendant "to be sure that there would be somebody there to help [plaintiff] distribute the money." On 26 June 1982 plaintiff executed a power of attorney in favor of defendant, which was subsequently recorded. On 8 July 1982 Mr. Rabil gave plaintiff a check for \$7,701.57, made out to plaintiff on the trust account of Mr. Rabil. Plaintiff and defendant then went together to the Wachovia Bank & Trust Company, where they opened a joint passbook savings account into which plaintiff deposited his check. No other funds were deposited into the account. Defendant has at all times since had possession of the passbook.

Plaintiff attempted to withdraw money from the account soon after depositing the check made out to him by Mr. Rabil, but was unable to do so because he did not have possession of the passbook, and repeated requests to defendant for the passbook were refused. Approximately one week after opening the account plaintiff learned that all of the money in the account had been withdrawn. Mr. Rabil testified that defendant called him "about ten days after the money was disbursed," that she "sounded frightened," and that she claimed someone had stolen her pocketbook which contained all of the funds withdrawn from the account.

At the close of plaintiff's evidence the court granted defendant's motion for a directed verdict. Plaintiff appealed.

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Habegger & Johnson, by Julia Hines Turner, for plaintiff, appellant.

No counsel contra.

HEDRICK, Judge.

"In this state, conversion is defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" *Spinks v. Taylor*, 303 N.C. 256, 264, 278 S.E. 2d 501, 506 (1981) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E. 2d 351, 353 (1956)). To recover on a claim for conversion, plaintiff must prove both ownership in himself and the wrongful possession or conversion of the property by the defendant. *Coulbourn v. Armstrong*, 243 N.C. 663, 91 S.E. 2d 912 (1956). Summary judgment is inappropriately granted when the evidence raises a genuine issue as to whether defendant's possession of plaintiff's property is authorized or wrongful. *Burns v. McElroy*, 57 N.C. App. 299, 291 S.E. 2d 278 (1982).

In the instant case there is evidence tending to show that defendant had authority to withdraw plaintiff's money from the account. The account was a joint account, as evidenced by the signature card and passbook, and plaintiff had given defendant a power of attorney. Nevertheless, this evidence is not sufficient to establish as a matter of law defendant's right to the sums deposited by plaintiff. When the evidence is considered in the light most favorable to the plaintiff, it is sufficient to raise an inference that plaintiff was the owner of the money in the joint account and that defendant wrongfully assumed and exercised the right of ownership over that property to the exclusion of plaintiff's rights as owner.

For the foregoing reasons, the judgment directing a verdict for defendant will be reversed and the cause remanded to the District Court for a new trial.

Reversed and remanded.

Chief Judge VAUGHN and Judge WELLS concur.

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AREA MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY OF VANCE, WARREN, FRANKLIN AND GRANVILLE COUNTIES v. HELENE SPEED

No. 8310SC804

(Filed 3 July 1984)

1. Administrative Law § 8— review of administrative action—reasons for decision

It is unnecessary for a trial judge who reviews administrative action under G.S. 150A-51 to explain the reasons for his decision to affirm such action.

2. Master and Servant § 7.5— age discrimination—replacement by unprotected person—showing not necessary

An employee subject to the State Personnel System was not required to show that she was replaced by a person outside the protected age group in order to establish a prima facie case of age discrimination. G.S. 126-16; G.S. 126-34; G.S. 126-36.

3. Master and Servant § 7.5— age discrimination—performance as good as retained employee—showing not required

Respondent employee was not required to show that her performance was at least as good as that of any retained employee in order to establish a prima facie case of age discrimination.

4. Master and Servant § 7.5— prima facie case of age discrimination

Respondent established a prima facie case of age discrimination in her dismissal by petitioner where she introduced evidence tending to show that she had been employed by petitioner for ten years and that her work had been consistently evaluated by her superiors as satisfactory, since such evidence supports an inference that respondent was qualified for her job and that her discharge resulted from discriminatory motives.

5. Master and Servant § 7.5— rebuttal of prima facie case of age discrimination

Upon an employee's establishment of a prima facie case of age discrimination, the employer then has the burden of articulating some legitimate, non-discriminatory reason for its actions toward the employee. In this case, the petitioner employer successfully rebutted respondent's prima facie showing of age discrimination by coming forward with evidence of nondiscriminatory reasons for its dismissal of respondent.

6. Master and Servant § 7.5— age discrimination—erroneous finding by State Personnel Commission

The State Personnel Commission erred in ruling that respondent was wrongfully dismissed from her job as a clerk-typist with an Area Mental Health Authority because of age discrimination where (1) the Commission improperly shifted the burden of proof to the Authority to show an absence of discrimination; (2) the Commission made no finding that the Authority's ac-

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tions were motivated by intentional discrimination; and (3) a contrary result was dictated by the Commission's own findings that a reduction in force was necessitated by funding cuts and that respondent was discharged because she was judged to have the lowest "relative efficiency" of the employees considered for the reduction in force.

7. Master and Servant § 7.5; Public Officers § 12— discharge of State employee— absence of discrimination— advisory opinion of State Personnel Commission

Where the State Personnel Commission's own findings dictated a conclusion that respondent employee was not subjected to discrimination, the Commission's authority with regard to an agency's discharge of respondent under a reduction in force was limited to issuance of an advisory opinion, and the Commission's order directing the agency to reimburse respondent for attorney fees, to award her back pay, and to remove certain critical documents from her personnel file was not binding on the agency. G.S. 126-37.

8. Public Officers § 12— discharge of State employee— fair and systematic procedure

A fair and systematic procedure was employed by an Area Mental Health Authority in its decision to discharge respondent clerk-typist when funding cuts and increased costs necessitated a reduction in force.

9. Public Officers § 12— removal of memoranda from personnel file— sufficiency of finding

A finding that two memoranda in respondent's personnel file were "inaccurate and misleading" supported an advisory decision by the State Personnel Commission recommending removal of the memoranda from the personnel file. G.S. 126-25.

10. Public Officers § 12— discharge of State employee— consideration of inaccurate memoranda

An agency's consideration of two "inaccurate and misleading" memoranda in respondent employee's personnel file was an insufficient basis for a ruling by the State Personnel Commission that the agency failed to follow proper procedures in discharging respondent when funding cuts and increased costs necessitated a reduction in force where the agency decision would have been the same had the documents not been included, and where the record contained considerable information tending to duplicate the data contained in the challenged documents.

APPEAL by petitioner from *Bowen, Judge*. Order entered 17 May 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 3 May 1984.

This is an appeal by petitioner Area Authority from an order of the Superior Court affirming the State Personnel Commission's award to respondent of back pay and attorney's fees because of wrongful separation from employment and ordering removal of

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two documents from respondent's personnel file. The record reveals the following:

The petitioner Area Authority is a public agency that provides mental health, mental retardation, and substance abuse services to a four-county area. The Area Authority has offices in all four counties it serves, with the largest office facility located in Henderson, North Carolina. Respondent, Helene Speed, is a former employee of the Area Authority, having served as a clerk-typist from 1971 until she was separated in 1981. Ms. Speed was discharged in August, 1981, with the stated reason for her separation being a reduction-in-force necessitated by funding cuts. In addition to Ms. Speed a psychologist employed by the Area Authority was discharged and another clerk-typist was reduced from full-time to half-time status. Respondent appealed the decision of the Area Authority to the State Personnel Commission, alleging that her discharge was due to age and sex discrimination and further asserting that the Authority's personnel policy relating to reduction-in-force was not followed. Hearing Officer Patsy R. Smith agreed with Ms. Speed's contentions regarding age discrimination and failure to follow personnel policy, but found that respondent had failed to make out a prima facie case of sex discrimination. After making extensive findings of fact and conclusions of law, the Hearing Officer recommended that Ms. Speed be reinstated with full back pay, that she be awarded reasonable attorney's fees, and that her personnel file be purged of two memoranda critical of her job performance. By order dated 21 October 1982 the Personnel Commission adopted the findings and conclusions of the Hearing Officer. The order entered by the Commission was identical to that recommended by the Hearing Officer, except that Ms. Speed was not ordered reinstated. On appeal by petitioner to Wake County Superior Court, the order of the Personnel Commission was in all respects affirmed. Petitioner appealed.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn, II, for petitioner, appellant.

Olive & Olive, by Susan Freya Olive, for respondent, appellee.

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HEDRICK, Judge.

N.C. Gen. Stat. Sec. 126-43 in pertinent part provides:

The provisions of the Administrative Procedure Act, Chapter 150A, shall apply to the State Personnel System and hearing and appeal matters before the Commission. . . .

N.C. Gen. Stat. Sec. 150A-51 sets out the scope of review and power of the reviewing court on appeals from administrative decisions as follows:

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

[1] We note at the outset that, although Judge Bowen affirmed the decision of the Personnel Commission, he did so in an order that consumes fourteen pages of the record. As the above-quoted statute indicates, it is unnecessary for a trial judge who reviews administrative action under G.S. 150A-51 to explain the reasons for his decision to affirm such action. The scope of the review to be conducted by this Court is of course also dictated by G.S. 150A-51. Accordingly, we limit our review of the Personnel Commission's decision to the grounds set out in the statute and will

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not concern ourselves with the gratuitous findings, conclusions, and recitals of Judge Bowen.

In the instant case respondent's separation was held wrongful by the State Personnel Commission on two distinct grounds: age discrimination and failure to follow personnel policy in regard to reduction-in-force. In reviewing the Commission's decision, for the errors set out in G.S. 150A-51, we will consider these grounds separately, and so now turn our attention to the Commission's findings and conclusions relating to age discrimination.

Our research has disclosed no case in this jurisdiction dealing with discrimination because of age. Our Legislature has, however, clearly expressed its intention that employees subject to the State Personnel System be protected from unfavorable employment decisions based on discriminatory motives:

All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment, without regard to race, religion, color, creed, national origin, sex, age, or physical disability to all persons otherwise qualified, except where specific age, sex or physical requirements constitute bona fide occupational qualifications necessary to proper and efficient administration. This section with respect to equal opportunity as to age shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

N.C. Gen. Stat. Sec. 126-16.

Any permanent State employee having a grievance arising out of or due to his employment and who does not allege discrimination because of his age, sex, race, color, national origin, religion, creed, physical disability, or political affiliation shall first discuss his problem or grievance with his supervisor and follow the grievance procedure established by his department or agency.

N.C. Gen. Stat. Sec. 126-34.

Any State employee or former State employee who has reason to believe that employment, promotion, training, or transfer was denied him or that demotion, layoff or termina-

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tion of employment was forced upon him in retaliation for opposition to alleged discrimination or because of his age, sex, race, color, national origin, religion, creed, political affiliation, or physical disability except where specific age, sex or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration, shall have the right to appeal directly to the State Personnel Commission.

N.C. Gen. Stat. Sec. 126-36.

Petitioner's first two contentions assign error to the Commission's conclusion that respondent established a prima facie case of age discrimination. Petitioner argues that this conclusion is unsupported by the evidence for two reasons: first, respondent made no showing that she was replaced by a person outside the protected age group, and second, respondent made no showing that "her performance was at least as good as that of any retained employee."

Our appellate courts have not heretofore been presented with an opportunity to discuss the elements of a prima facie case of age discrimination. We find much guidance, however, in our Supreme Court's discussion of racial discrimination in *Dept. of Correction v. Gibson*:

[A] prima facie case of discrimination . . . may be established in various ways. For example, a prima facie case of discrimination may be made out by showing that (1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group. (Citations omitted.)

A prima facie case of discrimination may also be made out by showing the discharge of a black employee and the retention of a white employee under apparently similar circumstances. (Citations omitted.)

308 N.C. 131, 137, 301 S.E. 2d 78, 82-83 (1983).

[2] Considered in light of the above-quoted language, we find no merit in petitioner's contention that Ms. Speed was required to show that she was replaced by a person outside the protected age

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group in order to establish a prima facie case of discrimination. Indeed, such a requirement would have the anomalous effect of rendering reduction-in-force decisions immune from claims of illegal discrimination and consequent judicial scrutiny. Our laws protect public employees from illegal discrimination in all employment practices, and we reject a rule which would make that protection unavailable to employees discharged because of a reduction-in-force.

[3, 4] Nor do we agree with petitioner that respondent is required to show that her performance "was at least as good as that of any retained employee." While it is true that one element of a prima facie case is a showing that the plaintiff is qualified for the position in question, petitioner misconstrues respondent's burden in this regard. "The plaintiff need not show perfect performance or even average performance to satisfy this element. He need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him." *Flowers v. Crouch-Walker Corp.*, 552 F. 2d 1277, 1283 (7th Cir. 1977). In the instant case, respondent introduced evidence tending to show that she had been employed by petitioner for ten years, and that her work had been consistently evaluated by her employers as satisfactory. This evidence provides more than adequate support for an inference that Ms. Speed was qualified for her job, and that her discharge resulted from discriminatory motives. In sum, we hold that the Commission's conclusion that respondent established a prima facie case of age discrimination is supported by substantial evidence and is free of other error of law.

Petitioner next contends that the Commission acted improperly in finding that the Area Authority had failed to produce evidence sufficient to rebut claimant's prima facie case. The employer's burden upon establishment of a prima facie case of discrimination has been the subject of much discussion by the courts of this country. Once again we turn to the words of our Supreme Court in *Gibson* for guidance in deciding the instant case:

Once a prima facie case of discrimination is established, the employer has the burden of *producing* evidence to rebut

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the presumption of discrimination raised by the prima facie case. (Citations omitted.) . . . [T]he employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons. The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.

308 N.C. 131, 138, 301 S.E. 2d at 83 (emphasis original).

The record contains the following conclusion made by the Commission: "[Area Authority] has not shown that it had legitimate non-discriminatory reasons for reducing [Ms. Speed's] position. . . . Therefore, [Ms. Speed] must also prevail on the issue of age discrimination."

[5] We think it clear from our examination of the Commission's order that the Commission acted under a misapprehension of the law in reaching the above-quoted conclusion. As *Gibson* plainly states, the Area Authority's burden upon respondent's establishment of a prima facie case was merely one of articulating some legitimate, nondiscriminatory reason for its actions in regard to Ms. Speed. The record contains abundant evidence in support of the reasons given by the Area Authority for its decision to discharge respondent. Petitioner, having satisfied its burden of production, was not required to assume as well the burden of proof.

Petitioner next assigns error to the Commission's conclusion that the Area Authority "did discriminate against [Ms. Speed] on the basis of age in its decision to RIF [reduce in force] her position." Petitioner contends that this conclusion is arbitrary and capricious, was affected by error of law, and is "not supported by substantial, competent and material evidence in view of the record as a whole."

Resolution of the issues raised by petitioner requires that we once again turn to the language of the Supreme Court in *Gibson*:

When the employer explains the nondiscriminatory reasons for his action, the plaintiff is then given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination. We note parenthetically that the plaintiff may rely on evidence offered to

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establish his prima facie case to carry his burden of proving pretext.

Id. at 139, 301 S.E. 2d at 84. Of particular interest in the context of the present case are the following statements made by the *Gibson* Court:

The trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination.

In *Loeb v. Textron*, 600 F. 2d 1003 (1st Cir. 1979), the Court stated:

"While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and non-discriminatory, but does not have to be a reason that the judge or jurors would act upon or approve. . . . An employer is entitled to make his own policy and business judgment. . . .

. . .

The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment. . . ."

Id. at 140, 301 S.E. 2d at 84 (citations omitted).

In the instant case, we have held that the Area Authority successfully rebutted respondent's prima facie case by coming forward with evidence of legitimate nondiscriminatory reasons for its actions in regard to Ms. Speed. Upon such rebuttal, respondent was obliged to prove by a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L.Ed. 2d 207, 215 (1981).

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[6] Although the Commission concluded that the Area Authority discriminated against Ms. Speed because of her age, this conclusion is without support in the findings of fact. The order of the Commission contains no finding that the reasons given by the Area Authority for its decision to discharge Ms. Speed were pre-textual. Nor did the Commission find or conclude that petitioner *intentionally* discriminated against Ms. Speed in making its decision. Termed "the ultimate question" by our Supreme Court, *Gibson*, 308 N.C. at 147, 301 S.E. 2d at 88, this critical issue is nowhere addressed in the order entered by the Commission. Indeed, the Commission's order contains findings that would support a contrary conclusion:

5. Due to economic conditions, Respondent [Petitioner herein] lost approximately \$160,000.00 in monies in fiscal year 1980/1981. In addition, Respondent's operating costs increased due to inflation. To maintain the level of services after these financial losses, Mr. J. Thomas McBride, the Area Mental Health Director, cut back on expenses, consolidated programs, authorized only necessary purchases, and froze all vacant positions. However, these cuts were not sufficient to effect the needed budget reduction, so positions had to be eliminated.

6. In order to determine which positions would be RIFed, Mr. McBride conducted a retreat in February or March, 1981, with members of his management team, consisting of 10 to 12 persons, e.g., the medical director, supervisors of clerical staff, et cetera. Mr. McBride decided to reduce non-direct service positions as far as possible. It was determined that the positions cut would be one clerk typist III, one clerk typist IV, and one psychologist position.

7. Mr. McBride made his recommendation that the above positions be reduced at the Board of Mental Health meeting on July 27, 1981. The Board approved this recommendation. According to Mr. McBride, there had not yet been a decision as to which office or which persons would be affected by the RIF. Sometime before July 29, 1981, Mr. McBride decided that the positions would come from the Henderson Clinic. Mr. McBride made the ultimate decision as to who would be reduced in force, consonant with the recommendations which

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evolved out of his discussions of personnel with members of the management team. None of these recommendations were made in writing.

8. The factors considered in determining which individuals would be RIFed were seniority, type of appointment, and relative efficiency. It was the consensus of the management team that seniority would have some weight, but that more weight would be assigned to relative efficiency, in light of reduced work force that would result from the RIF.

. . .

11. *In the RIF selection design used by Mr. McBride, relative efficiency was deemed to be the most important and in essence, the determinative factor. The decision on whether to retain an employee was based on that employee's job performance, the impact of the employee's position on programs, and in particular, whose reduction would have the least negative impact on clinic operations and programs. Petitioner [Respondent herein], a Clerk Typist IV over 40 years of age, and one male psychologist were RIFed. Petitioner's relative efficiency was judged through discussions with the management team, to be the lowest. [Emphasis added.]*

. . .

In essence, the decision to RIF [Ms. Speed] was based on the subjective determinations and recommendations of undocumented performance inefficiencies and attitudinal problems on [Ms. Speed's] part, by the members of the management team.

Thus, the Commission's own findings indicate that Ms. Speed was discharged not because of her age, but because she was judged to have the lowest "relative efficiency" of the employees considered for reduction-in-force. While the Commission may disagree with the Area Authority's judgment in this regard, Gibson clearly states that such disagreement will not support a finding of intentional discrimination:

[I]t is not important that the trier of fact believes the employer's judgment or course of action to be erroneous or

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even unreasonable as the *only* relevant question, and the *sole* focus of the inquiry, is the employer's motivation.

Gibson at 141, 301 S.E. 2d at 85 (emphasis original).

Because the Commission improperly shifted the burden of proof to petitioner to show an absence of discrimination, and because the Commission made no finding that petitioner's actions were motivated by intentional discrimination, and because the Commission's own findings dictate a contrary conclusion, we hold that that portion of the Commission's decision relating to age discrimination must be reversed.

[7] We now turn our attention to the second basis relied upon by the Personnel Commission for its decision in respondent's favor, *to wit*, that the Area Authority failed to comply with applicable reduction-in-force policy. Before reaching the substantive aspects of this issue, we must first consider the source and extent of the Personnel Commission's authority.

N.C. Gen. Stat. Sec. 126-5(a) provides that Chapter 126, entitled "State Personnel System," "shall apply . . . to employees of local social services departments, public health departments, *mental health clinics*, and local civil defense agencies which receive federal grant-in-aid funds." (Emphasis added.) N.C. Gen. Stat. Sec. 126-37 (Cum. Supp. 1983) in pertinent part provides:

The decisions of the State Personnel Commission shall be binding in appeals of local employees subject to this Chapter if the Commission finds that the employee has been subjected to discrimination prohibited by Article 6 of this Chapter. . . . However, in all other local employee appeals, the decisions of the State Personnel Commission shall be advisory to the local appointing authority. An action brought in superior court by an employee who is dissatisfied with an advisory decision of the State Personnel Commission or with the action taken by the local appointing authority pursuant to the decision shall be heard upon the record and not as a trial *de novo*.

We have held that the Personnel Commission's own findings dictate a conclusion that Ms. Speed was not "subjected to discrimination." It follows that the Commission's authority in regard to petitioner's reduction-in-force action is limited to issuance of an advisory decision. The Commission's order directing petitioner to

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reimburse respondent for attorney's fees, to award her full back pay, and to remove certain critical documents from her file is thus in no way binding on the Area Authority. Furthermore, for the reasons discussed below, we believe the Commission's order is based upon a misapprehension of the law relating to reductions-in-force.

We first take judicial notice, pursuant to N.C. Gen. Stat. Sec. 150A-64, of the following provisions of the North Carolina Administrative Code relating to separation of employees subject to the State Personnel System:

(a) Policy. An appointing authority may separate an employee whenever it is necessary due to shortage of funds or work, abolishment of a position or other material change in duties or organization. Retention of employees in classes affected shall be based on systematic consideration of type of appointment, length of service and relative efficiency; the relative weight of each of the factors stated in this Paragraph is to be determined by management in making reduction in force decisions. However, neither temporary, probationary nor trainee employees shall be retained in cases where permanent employees (those who have satisfactorily completed a probationary or equivalent trial period) must be separated in the same or related class. Employees should be given notice as soon as possible of any reduction in force.

. . .

(e) Appeals. A permanent employee with 5 years continuous service or status under competitive service who is separated due to reduction in force shall have the right to appeal to the State Personnel Commission for a review to assure that systematic procedures were applied. Provisions of the appeal procedure will be followed.

25 N.C.A.C. 1D.0504. Also relevant to our inquiry are the Code provisions relating specifically to local employees:

SEPARATION

. . .

(b) Employees who have acquired permanent status will not be subject to involuntary separation or suspension ex-

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cept for cause, or reasons of reduction in force, or mandatory retirement age. . . .

. . .

(2) Dismissal. Dismissal is involuntary separation for cause and shall be made in accordance with the provisions of the Policy on Suspension and Dismissal.

(3) Reduction in Force. For reasons of curtailment of work or lack of funds, the appointing authority may separate employees. Retention of employees in classes affected shall be based on systematic consideration of type of appointment, length of service and relative efficiency. . . .

. . .

(d) A permanent employee who is separated due to reduction in force shall have the right to appeal to the State Personnel Commission for a review to assure that systematic procedures were applied equally and fairly. The appeal shall be submitted in writing to the State Personnel Director not later than 30 days after the effective date of separation. The State Personnel Commission shall determine if the appeal is valid and make its recommendation to the agency. The employee shall be notified in writing and a copy of the notice placed in the permanent record of the employee.

25 N.C.A.C. 11.0904. The personnel policy pursuant to which the Area Authority acted is a part of the record on appeal and contains provisions that are essentially a restatement of the regulations above.

From the above-quoted regulations, we distill the following applicable principles: Petitioner has authority to separate employees in the event funding cuts make it necessary to abolish positions. In deciding what employees to retain when a reduction-in-force is necessary, the appointing authority is to systematically consider three factors: (1) type of appointment; (2) length of service; (3) relative efficiency. The weight to be accorded each factor is to be determined by management. Employees separated due to reductions-in-force may appeal to the State Personnel Commission, which shall review the decision of the appointing authority "to assure that systematic procedures were applied equally and

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fairly." After completing its review, the Commission shall make a recommendation to the local agency.

Applying these principles to the instant case, we first point out that the necessity to abolish some positions because of funding cuts and increased costs has never been disputed. The Commission's findings of fact indicate that petitioner utilized the following procedure in deciding to separate Ms. Speed: Area Director Thomas McBride first met with members of the "management team" to determine what positions should be abolished. It was decided at this point that, as far as possible, "non-direct service positions" should be reduced, and the position of Clerk-Typist III was one of the three identified for reduction. The Board of Mental Health approved the recommendation of the Area Director in this regard and Mr. McBride then set about determining which of the fifteen Clerk-Typist III positions should be abolished. He first ascertained that all of the individuals in question were permanent employees, thus rendering the "type of appointment" factor of no significance. As part of the selection process Mr. McBride reviewed the personnel files of the various Clerk-Typist III employees. He did not at this time perform a quantitative analysis of the performance evaluations contained in these files because of his belief that any such analysis would be invalid due to the variabilities among the supervisors who conducted the evaluations. In addition to reviewing personnel files, Mr. McBride also consulted the members of the Area Management Team for specific recommendations, including persons who supervised Ms. Speed. The relative weight to be accorded seniority and relative efficiency was discussed by the Area Management Team, which resolved to give primary consideration to relative efficiency "in light of reduced work force that would result from the RIF." The ultimate decision to eliminate the position held by Ms. Speed was "consonant with the recommendations which evolved out of . . . discussions of personnel with members of the management team."

[8] We think the procedure outlined in the Commission's findings of fact a fair and systematic one. Whether the Commission itself might choose to utilize a different procedure is irrelevant. We find nothing in the findings of fact to indicate that Ms. Speed was unfairly singled out for separation, or that she was a victim of hasty or careless decision-making. Our review of the record

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reveals that Mr. McBride systematically sought out and considered all the available data in arriving at his decision. Contrary to the Commission's suggestion in its findings of fact, there is no requirement that the recommendations of the Area Management Team be written rather than oral. Nor is there a requirement that the Area Director conduct a quantitative analysis of performance evaluations; indeed, we find persuasive Mr. McBride's contention that the results of such analysis would be of dubious value. Nor is management obliged to give equal weight to length of service, as is suggested by the Commission's order. The provisions of the Administrative Code, set out above, state that management has discretion in determining the weight to be accorded the factors it considers. In sum, then, we hold that the Commission's own findings dictate a conclusion that systematic procedures were fairly and equally applied with regard to the separation of Ms. Speed.

[9, 10] Our decision in this regard is rendered no less certain by Mr. McBride's consideration of two critical memoranda contained in Ms. Speed's personnel file. We are aware that the Commission found these documents to be "inaccurate and misleading," and that petitioner has not excepted to this finding. Such a finding, unchallenged on appeal, supports an *advisory* decision by the Commission recommending removal of the documents from Ms. Speed's personnel file. N.C. Gen. Stat. Sec. 126-25. The fact that some of the data considered by the Area Authority may have been without factual basis, however, does not necessarily render its ultimate decision erroneous. Indeed, we think it inevitable in decisions of this sort, where information is gathered in a number of ways and from a number of sources, that some data of questionable validity will be considered. In the instant case Mr. McBride testified that, while his decision was "influenced" by the challenged documents, the amount of such influence was "not a lot." He added that he "took into consideration much additional information," and that his decision would have been the same had the documents not been included. Furthermore, we note that the record contains considerable information, provided to and considered by Mr. McBride, that tends to duplicate the data contained in the challenged documents. We thus believe the Area Authority's consideration of the memoranda insufficient basis for the Commission's ruling that petitioner failed to follow proper

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procedure in regard to the reduction of Ms. Speed's position. Because our examination of the record as a whole reveals no other support for such a conclusion, the ruling of the Personnel Commission in this regard must be reversed.

The decision of the Superior Court is reversed and the cause is remanded to that court for entry of an order to the following effect: the decision of the Personnel Commission relating to removal of two memoranda from respondent's personnel file is modified so as to be advisory rather than binding in nature. The remainder of the decision of the Personnel Commission is reversed in accordance with this opinion and the proceeding is remanded to the Personnel Commission for entry of an order affirming the decision of the Area Authority.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

ROBERT E. PEOPLES, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER,
SELF-INSURER

No. 8310IC183

(Filed 3 July 1984)

Master and Servant § 68— occupational disease—sufficiency of evidence of total disability

The medical evidence in a workers' compensation proceeding was sufficient for the Industrial Commission to find that plaintiff was totally and permanently disabled within the meaning of G.S. 97-2(9), and defendant's offer of continued "employment" at equal or better wages was not conclusive on this issue.

Judge WELLS concurring.

Judge HEDRICK joins in this concurring opinion.

APPEAL by defendant from the Opinion and Award of the North Carolina Industrial Commission. Opinion and Award entered 28 October 1982 and amended 3 November 1982. Heard in the Court of Appeals 19 January 1984.

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This workers' compensation action based on total permanent disability resulting from an occupational disease was instituted in 1978 with the Industrial Commission. Plaintiff alleged that he was disabled due to byssinosis. A hearing was held on 17 July 1979. Witnesses at this hearing were the plaintiff, Dr. Thomas K. White, a psychologist qualified as an expert in vocational rehabilitation and job skills, and Randolph Stevenson, personnel manager with Cone Mills at the plant where plaintiff worked. Thereafter, depositions were taken from Doctors Mario Battigelli and George Kilpatrick, physicians specializing in pulmonary diseases who were members of the Industrial Commission panel on occupational diseases.

On 14 January 1980, the deputy commissioner entered an Opinion and Award the essential findings of which are quoted in part below:

2. . . . Plaintiff began in 1955 his employment with defendant employer as a stitcher operator for 5 to 6 weeks in the cloth room while on probation. Then he worked in the card room as an overhaul mechanical helper before being promoted to boiler fixer and emergency mechanic in the card room. Plaintiff then became an overhauler and finally a card room supervisor, initially with responsibility for manual labor, but for the last 4 to 5 years, he worked in a strictly supervisory capacity with authority over a number of machines and employees. Plaintiff's last 4 days of employment at the mill was in the supply room.

. . . .

5. Plaintiff's breathing problems caused him difficulty at work in his supervisory capacity in that he could talk for only limited periods, he could not make patrol rounds and his supervisor instructed him to stay on the floor, where the dust bothered him, and not in the office which was air-conditioned. Due to his breathing problems, plaintiff had been placed on leave of absence status on three occasions by Dr. Kilpatrick during which time he received full wages.

6. Plaintiff was transferred from his supervisory position in the card room to supply room employee in order that he could avoid cotton dust exposure at the doctor's recommenda-

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tion. He was initially offered this position on a temporary basis until December 31, 1978 when he was to be given the same considerations as other employees in this classification for job placement and lay-off procedures. Plaintiff was to continue at his same salary level while in the supply room and in fact, was paid this full salary until the end of February, 1979. The supply room was approximately 75 feet by 125 feet with numerous storage bins and cabinets for mechanical parts. He was the only employee on the third shift, which normally had a lighter work load than the other shifts. Plaintiff filled machine parts orders which he received at two locations, from a dumbwaiter from the weave room and from a window counter. He lifted parts ranging in weight from two to three ounces to fifty pounds in filling these orders. During lulls between orders, he took inventory, handled incoming parts and swept the floor to remove the bothersome dust which filtered down from the flows above and from the elevator shaft and stairway. His work involved bending, stooping, lifting, and reaching, and by inference, walking.

Plaintiff was able to work in this position four hours on each of four days until October 5, 1978. Due to increased breathing problems, plaintiff was immediately hospitalized fifteen days and has not since returned to work, or earned wages.

7. Plaintiff is currently plagued with persistent shortness of breath, constant weakness and coughing. He has difficulty resting, walking on level ground, dressing and showering due to these breathing problems.

...

[Findings 9 and 10 concern the diagnoses of Doctors Battigelli and Kilpatrick as to the cause and extent of plaintiff's disability.]

...

11. The defendant employer has continued to offer to plaintiff the supply room position which they describe as follows:

1. The environment was lint and dust free;

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2. The lifting or physical exertion requirements were as light in this position as any other place in the plant;

3. This position is currently being occupied by a female employee on other shifts, and this position is traditionally held by a female employee;

4. At the time Mr. Peoples was offered this job, he was informed that it would not require any reduction in his current salary;

5. The volume of work in this position is not great, and it would not be unusual for as much as an hour to pass at this job when there were no requests for orders to be filled;

6. Mr. Peoples would not be required to lift any objects that he did not feel he would be able to lift or move.

12. Both physicians were of the opinion that plaintiff was capable of tolerating a sedentary type job, under such conditions as the defendant employer described as applicable to the supply room position. However, both felt that either the presence in the supply room of even minimal dust from extraneous sources or a moderate amount of moving about to carry parts to fill orders would render the offered job unsuitable and undesirable employment for plaintiff.

. . .

14. The supply room conditions, in actuality, are not those as described by the defendant employer in that there is dust present in the supply room which is bothersome to the plaintiff. To say that the room is air conditioned is not to say that the air is filtered. Additionally, the plaintiff did and would have to more [sic] about to fill orders. Even if he was required only to lift parts he felt capable of lifting, there most probably would be occasions when an order is placed via the dumbwaiter when no one else is present, especially considering that he would be the only employee hired on that shift. Obviously, some movement is required to locate parts in a room of this size. The job offered, in fact, is not totally sedentary. In addition, a female has not traditionally held a similar position to the one offered plaintiff at the Edna plant, though currently one is employed in the supply room.

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The deputy commissioner concluded that plaintiff had contracted byssinosis, that he had a permanent partial disability of 66 2/3%, and entered an award based on these conclusions. The deputy commissioner also concluded:

3. In refusing to accept the defendant employer's offer of a position in the supply room, plaintiff is justified in that the job's actual physical requirements, though limited, exceed plaintiff's physical capacity and the environmental conditions, though more suitable than the cardroom, endanger plaintiff's health. G.S. 97-32.

Both parties gave notice of appeal to the full Industrial Commission. Defendant's contention there was that the deputy commissioner's findings and conclusions regarding the supply room job offered to plaintiff and his physical inability to perform that job lacked evidentiary and factual support. Defendant also contended that there was no factual basis for the conclusion that plaintiff was disabled.

Plaintiff's contention was that the evidence compelled findings and conclusions that plaintiff was permanently and totally disabled by byssinosis and that the deputy commissioner's finding of partial disability was erroneous.

After reviewing the case, the full Commission on 30 October 1980 ordered that a hygiene survey be performed to determine the "atmospheric content of the work environment," i.e., whether it was dusty. The deposition and technical report of Melvin Witcher, the Department of Human Resources employee who performed the survey, were made part of the record before the Commission. Likewise, the depositions of Dr. Kilpatrick and Randolph Stevenson and the testimony of Dr. Battigelli, taken at a hearing held on 6 January 1982, were included in the record. On 28 October 1982, the full Commission entered an opinion and award in which it adopted the first eleven findings of fact from the opinion and award of the deputy commissioner (set forth in pertinent part above) and made the following additional findings of fact:

12. Plaintiff's pulmonary condition, from a clinical point of view, has remained about the same to slightly worse since August of 1979. According to Dr. Kilpatrick, who has con-

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tinued to treat the plaintiff, his arterial blood gases have shown some deterioration as is usually associated with episodes of acute and chronic bronchitis. Plaintiff also had a symptomatic progression of chest pain until July of 1981.

. . .

15. In accordance with the October 30, 1980 Order by Chairman Stephenson for the Full Commission, a dust exposure level evaluation of the supply room at the defendant-employer's Edna Plant was performed on December 16 and 17, 1980, by Melvin R. Witcher, Jr., an Industrial Hygiene Consultant for the Department of Human Resources, Division of Health Services, Occupational Health Branch. Measured over a five-hour period during the plant's first shift on December 17, 1980, the supply room's dust levels ranged from 90 to 98 micrograms per cubic meter of air, well below the OSHA permissible exposure limit of 500 micrograms per cubic meter of air for this particular area of the plant. Based on these results, Mr. Witcher did not feel that supply room employees would experience significant cotton dust exposure. However, he did subsequently state, by way of deposition, that visible dust would not have been sampled because it settles out of the measuring devices (vertical elutriators), and that he made no qualitative evaluation of the dust present in the supply room.

16. Dr. Kilpatrick's ultimate opinion was that plaintiff would not be able to work in the supply room although he felt that the plaintiff might be able to simply sit there. This opinion was based on what Dr. Kilpatrick felt was plaintiff's "total inability to work on any job that requires physical exertion," even constant walking, and which also might expose him to dust, both cotton and ordinary, in quantities sufficient to aggravate his health and endanger him.

17. Dr. Battigelli expressed his opinion as to an anticipated negative physical and emotional reaction by the plaintiff to the position offered. Dr. Battigelli reaffirmed his earlier statement that cotton dust exposure, as well as exposure to any irritant, would deteriorate the plaintiff's physical condition, unequivocally. In addition, he found that plaintiff's emotional reaction to the supply room position

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would certainly affect the suitability of the job. In Dr. Battigelli's opinion, the readjustment required would be a continuous source of emotional difficulty and aggravation to the plaintiff.

18. Plaintiff was also examined by Dr. Thomas K. White, a private psychologist with special expertise in vocational rehabilitation and job skills. This doctor was of the opinion that plaintiff "could not return to any of the work which he has done in the past" and that he "could not undertake significant gainful employment existing in the regional and national economies in significant numbers" because of his lack of residual and transferable job skills. In addition, Dr. White opined that the plaintiff could not fill a job such as that offered on a full-time regular basis due to his health, and thus that it ultimately would be more favorable for him not to undertake the proffered supply room position.

The Commission noted in its findings that plaintiff underwent coronary bypass surgery in the summer of 1981 and that, while his chest pain had since decreased, he still suffered from shortness of breath. The Commission further found that as a result of byssinosis, plaintiff was totally disabled.

The Commission concluded that plaintiff was entitled to workers' compensation for the permanent total disability resulting from his byssinosis and for medical expenses in connection with its treatment. The Commission further concluded that plaintiff was justified in refusing the job offered him in the supply room.

Accordingly, the Commission awarded benefits to plaintiff, accrued since 5 October 1978, his last day worked, as well as attorney's fees and the costs of the action. An error in the amount of the award was corrected by amendment on 3 November 1982. On 10 November 1982, defendant appealed.

Kirby, Wallace, Creech, Sarda and Zaytoun, by John R. Wallace, for plaintiff-appellee.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan and Caroline Hudson, for defendant-appellant.

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EAGLES, Judge.

I

Defendant first argues that the Industrial Commission erred in finding and concluding that plaintiff was totally and permanently disabled when there is evidence that he was offered employment consistent with his medical limitations at no reduction in pay. Defendant argues that the evidence tends to show (1) that changes in the operation of the mill had measurably improved the dust content in the supply room air since plaintiff had last worked there in October of 1978, (2) that the job was totally sedentary and any requirement that plaintiff lift or carry anything had been removed, (3) that he could work only when he felt himself able to do so and only for so long as he was able, and (4) that he would be paid his former salary.

a.

Defendant's argument centers on the statutory definition of disability:

The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

G.S. 97-2(9). Many opinions from this Court and our Supreme Court have interpreted this provision in a manner similar to *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438 (1951). There, our Supreme Court said,

The disability of an employee because of an injury is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. Loss of earning capacity is the criterion. If there is no loss of earning capacity, there is no disability within the meaning of the act. (Citations omitted.)

Id. at 448-49, 64 S.E. 2d at 440. See, e.g., *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Ashley v. Rent-a-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967); *Hall v. Thomason Chevrolet*, 263 N.C. 569, 139 S.E. 2d 857 (1965); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951); *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982) (dealing specifically with disability resulting from byssinosis); *Morgan v. Thomasville Furn. Industries*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968). See generally

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8 N.C. Index 3d, Master and Servant, § 69.1 (1977 and Supp. 1983).

b.

With this definition of disability in mind, the claimant in a Workers' Compensation case has the burden of proving (1) that the claimed disability is the result of a compensable injury, and (2) that he or she was incapable after the injury of earning, in the same or any other employment, the same wage earned before the injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982); *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E. 2d 660, cert. denied, 281 N.C. 154, 187 S.E. 2d 585 (1972). In determining whether a claimant has met this burden before the Industrial Commission, our review is limited to the issues of (1) whether the Commission's findings of fact are supported by any competent evidence and (2) whether those findings justify the legal conclusions and decision of the Commission. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). These standards of review apply even though there may be evidence which supports different findings or conclusions. *Id.*, *Inscoc v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977).

In this case, defendant makes no specific exception to the Commission's findings and conclusions that plaintiff suffers from chronic obstructive pulmonary disease (COPD) with a byssinosis component. Under their general exception to the entry of the opinion and award, they do not argue that the Commission's conclusions regarding plaintiff's byssinosis are not supported by the findings of fact. Byssinosis, as a component of COPD, is a compensable occupational disease. *Rutledge v. Tultex*, 308 N.C. 85, 301 S.E. 2d 359 (1983); G.S. 97-52, 97-53(13). There is likewise no dispute that plaintiff is unable to return to his old job as a floor supervisor. Assuming that plaintiff's byssinosis has made a return to his former job impossible, plaintiff still has the burden of proving that his byssinosis disables him from earning the same wage in any other employment. See *Robinson v. J. P. Stevens*, *supra*. Plaintiff must also prove the extent of that disability. *Hilliard v. Apex*, *supra*.

c.

The thrust of defendant's argument is that the evidence shows that defendant is willing to pay plaintiff his old salary to

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perform another job that is within his medical restrictions, however limiting they might be, and that he is therefore not disabled and not entitled to disability compensation within the meaning of the law. We disagree.

Although the evidence is conflicting, there is sufficient competent evidence to support the Commission's findings of fact regarding plaintiff's physical condition and his inability to perform the proffered supply room job. In his deposition, Dr. Battigelli volunteered his opinion that "even a menial, minimal amount of activity indeed may be taxing Mr. Peoples' tolerance to a significant extent." Dr. Kilpatrick testified that physical exertion or exposure to *any* cotton dust would endanger Mr. Peoples' health.

The testimony of Melvin Witcher, who performed the hygiene survey, was that the supply room area, where Mr. Peoples would have worked, was "a very clean work area," and that there was very little difference between the air quality in the supply room and "outside on a clear fall day" or in the conference room where his deposition was taken. There is no testimony in the record, however, that the amount of cotton dust in the supply room, by whatever source generated, was so insignificant as to make it an acceptable work environment for the plaintiff. The testimony indicates rather that Mr. Peoples' byssinosis was such that it was capable of escalating unpredictably and regardless of whether he was at work, at home, or whether he was engaged in any physical activity. Dr. Kilpatrick testified on cross examination by defendant:

In my opinion, in talking to and testing Mr. Peoples over a period of a little over a year now, I think, it would be better for him not to work in that I don't know at which time his disease is going to exacerbate,

II

Defendant nevertheless contends that the supply room job is consistent with Mr. Peoples' medical limitations in that he need not engage in any physical activity at all and that he would only be required to work when, if, and for as long as he felt able to do so. Theoretically, given our understanding of Mr. Peoples' medical limitations, defendant is willing to pay him the same salary in the

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supply room job that he was earning as a supervisor without regard for whether he comes to work, how long he stays, and how much he does while he is there. Defendant argues that, as long as plaintiff receives compensation for this "work," he is not disabled for purposes of workers' compensation law and cannot claim benefits for a disability.

a.

Defendant relies for this contention on the case of *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943). The claimant in *Branham* had injured his back so that he was unable, upon returning to work, to perform the full range of physical tasks he had performed prior to the injury. His employer offered him his old wage to work at a similar job that was within his ability to perform. The claimant filed a workers' compensation claim. The Commission in *Branham* found that the claimant was entitled to compensation for the statutory period "less such time that he has been paid full wages." *Id.* at 235, 25 S.E. 2d at 867, quoting the opinion and award of the Industrial Commission. The Commission found that the claimant there had returned to work within the seven day waiting period and was "'being paid full wages in lieu of compensation by his employer.'" *Id.* The *Branham* claimant was awarded medical expenses but the Commission withheld compensation for the injury provided that, within the period covered by the award, his wages did not fall below what he was being paid prior to his injury. On appeal by the claimant, the Superior Court held that no compensation was appropriate on the facts of the case. The claimant appealed to the Supreme Court.

The Supreme Court held that the Superior Court had correctly ruled that plaintiff was not entitled to workers' compensation as long as he was earning his old wage. Defendant here contends that Mr. Peoples' situation is identical to that of the claimant in *Branham* and that Mr. Peoples, like the claimant in *Branham*, has taken the position that the "wages offered to him by Cone Mills are offered out of sympathy and that they do not reflect his actual earning capacity and should be discounted for purposes of determining disability." The *Branham* court, relying on the legal meaning of disability set forth above, answered this argument as follows:

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However urgently he may insist that he is "not able to earn" his wages, the fact remains that he is receiving now the same wages he earned before his injury. That fact cannot be overcome by any amount of argument. It stands as an unassailable answer to any suggestion that he has suffered any loss of wages within the meaning of the Act.

. . . There is no "disability" if the employee is receiving the same wages in the same or any other employment. That "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this be not "the same employment" then it clearly comes within the term "other employment."

Id. at 237, 25 S.E. 2d at 868. We note that this language was held to be *dictum* in *Ashley v. Rent-a-Car Co.*, *supra*.

While agreeing with the reasoning underlying the lower court decision in *Branham*, the Supreme Court did not unreservedly affirm it. Rather, it modified that decision of the Superior Court so that the conclusions and award of the Industrial Commission were "affirmed without qualification." *Branham v. Panel Co.*, *supra*, at 239, 25 S.E. 2d at 869. In so holding the Court reasoned:

To protect the employee against the possibility that the employer might, at the expiration of 12 months [now 2 years for occupational diseases, G.S. 97-58], . . . discontinue the employment and thus defeat the rights of the employee, the commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. The court below entered judgment striking this provision and affirming the judgment of the commission as thus modified. The exception to the judgment challenges the correctness of this ruling. It must be held for error.

The commission adjudged the rights and liabilities of the parties. It then directed compensation at this statutory rate "at any time it is shown that the claimant is earning less," etc. By this order, the commission, in effect, retained jurisdiction for future adjustments. In so doing, it did not exceed its authority.

Id. at 238, 25 S.E. 2d at 868-69 (bracketed portion added).

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b.

While there are factual similarities, *Branham* is distinguishable in that it involved permanent *partial* disability while this case involves permanent *total* disability. Furthermore, *Branham* stands for a proposition that, if anything, weakens defendant's argument rather than supports it. We read *Branham* to say that an employer may *not* avoid its liability under the workers' compensation law by offering an injured employee a job at his old wage that is within his ability to perform. Defendant's reliance on *Branham* is clearly misplaced.

Here, plaintiff has satisfactorily established that he is totally and permanently disabled and that his disability is due to an occupational disease. He is therefore entitled to compensation for the disability as prescribed in G.S. 97-29. The fact that defendant has offered to pay plaintiff his full salary to work at a "job" that is allegedly consistent with his medical limitations does not negate either plaintiff's disability or the defendant employer's obligation to compensate him for it. *Ashley v. Rent-a-Car Co.*, *supra*. Defendant has attempted here to remove any practical difference between compensation for a disability and wages for work performed. Indeed, plaintiff's weekly salary is more than he stands to receive by way of compensation for his injury. But the difference between the two, as noted in *Branham* and *Ashley*, is more than semantic: certain legal rights attach to plaintiff's entitlement to workers' compensation that do not attach to his status as an employee. Defendant's argument in effect urges us to ignore these differences. This we cannot do and we accordingly find defendant's first argument to be without merit.

III

Defendant next argues that the Commission erred in finding and concluding that plaintiff's refusal to take the supply room job was justified. This argument is largely predicated on the contention considered and rejected above: that the supply room job was consistent with plaintiff's medical limitations and he was therefore required to accept it. Having rejected that contention, we find no merit in defendant's argument here. The only additional point urged by defendant is that plaintiff's continued refusal to accept the supply room position was unjustified because it was based on a fear that his condition would be aggravated as it was

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when he attempted to work in October of 1978. Defendant contends that this fear no longer has a basis in fact because of improvements in the air quality in the supply room and changes in the job requirements.

As noted above in Part I, the evidence shows clearly that Mr. Peoples' byssinosis is capable of escalating under any circumstances. Moreover, his October 1978 attempt to work in the supply room for four half-days caused him to be hospitalized for two weeks and required him to rest practically the whole time away from work on those four days. Regardless of changes in conditions affecting the supply room job, Mr. Peoples' fear that his condition will be aggravated is hardly baseless. There is medical testimony in the record that plaintiff's anxiety that something may happen to him on the job contributes to the aggravation of his condition. Defendant's second argument is without merit.

IV

Defendant next argues that the Commission erred in awarding compensation for total permanent disability. In support of this argument, defendant contends that the evidence shows that plaintiff was only partially disabled from byssinosis. As we noted earlier, plaintiff has established that he is totally disabled from any work and that his disability is due to an occupational disease. Accordingly, we find no merit in this argument.

V

Finally, defendant argues that, if plaintiff is found entitled to compensation, the award should be adjusted to reflect the amount paid to him as wages. We agree. The findings of fact show that plaintiff was paid his full wage from 5 October 1978 through February 1979, even though he last worked on 5 October 1978. The Commission concluded that plaintiff was entitled to compensation beginning 5 October 1978. While plaintiff is entitled to the compensation awarded, the self-insured employer is entitled to a setoff against the amount it must pay plaintiff for wages paid to him after the effective date of the award. We therefore remand the cause to the Industrial Commission for further proceedings as necessary to determine the proper award.

In re Lee

Remanded.

Judge WELLS concurs.

Judge HEDRICK concurs in the result.

Judge WELLS concurring.

I deem it important to emphasize the dispositive issue in this case. The medical evidence was abundant that plaintiff was disabled within the meaning of G.S. 97-2(9). Although defendant's offer of continued "employment" at equal or better wages might constitute some evidence of plaintiff's ability *to continue to earn* wages, it certainly is not conclusive in this issue.

Judge HEDRICK joins in this concurring opinion.

IN RE: PROCEEDINGS FOR THE CONDEMNATION OF A FEE SIMPLE INTEREST IN LAND OWNED BY: R. D. LEE, RACHEL LEE, W. R. SORRELL, CHARLES B. LEE, MARGARET G. LEE, WILLIAM D. LEE, ANN MCLEOD LEE, JOHNNIE G. LEE, SHERRY W. LEE, HAZEL F. YOUNG, ISABELLA MCKAY YOUNG, BECKER SAND AND GRAVEL COMPANY, INC., DUNN PRODUCTION CREDIT ASSOCIATION, EDGAR R. BAIN, TRUSTEE, AND MRS. CAROL P. PARKER, EXECUTRIX OF THE ESTATE OF E. A. PARKER

No. 8311SC107

(Filed 3 July 1984)

1. Eminent Domain § 6.7— economic feasibility of mining condemned land—admissibility of evidence

In a condemnation proceeding in which an issue was presented as to whether the value of the condemned land was affected by a sand and gravel deposit underlying it, the general subject of the economic feasibility of mining the sand and gravel deposit on the tract and of processing the minerals was relevant and open to cross-examination and rebuttal by the condemnor where the question of the economic feasibility of mining the deposit and the related questions of the economic feasibility of building a processing plant on the site before the taking and the feasibility of processing the minerals at a nearby plant were raised by respondent landowners during their case in chief.

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2. Eminent Domain § 6.5— opinion as to value—market data method based on hearsay—admissibility

An expert's opinion as to the highest and best use of condemned property and the value thereof using the "market data" or "direct sales comparison" method was admissible although it was based partly on hearsay information from others concerning sales of other lands where such hearsay was inherently reliable in that it was from disinterested persons and involved routinely sought information for a standard method of appraising real estate.

3. Trial § 10.3— court's questioning of witness—declaration that witness was expert—no expression of opinion

The trial court did not express an opinion on the credibility of a witness in violation of G.S. 1A-1, Rule 51(a) by questioning the condemnor's expert witness or by ruling in the presence of the jury that the witness was an expert in the testing of sand and gravel deposits where the court's questions were clearly for clarification purposes, and where the witness was not a party to the litigation and declaring him to be an expert in no way touched upon any question which the jury had to decide.

4. Eminent Domain § 5— amount of compensation supported by evidence

The evidence in a condemnation proceeding was sufficient to support a conclusion that the highest and best use of the subject lands was farming and limited residential, not mining of sand and gravel, and the amount of compensation awarded by the jury was consistent with such a conclusion. The fact that the landowners introduced evidence of damages in amounts exceeding the award does not show an abuse of discretion in refusing to set aside the verdict since the jury was not compelled to accept the landowners' testimony with respect to their damages.

APPEAL by respondents from *Britt, Judge*. Judgment entered 9 June 1982 in Superior Court, HARNETT County. Heard in the Court of Appeals 10 January 1984.

The County of Harnett instituted this proceeding to condemn 34.65 acres of land for use by the public as an airport in 1979, pursuant to the then existing Chapters 153A and 160A of the North Carolina General Statutes. The preliminary condemnation resolution was filed on 12 June 1979, and the taking occurred on 24 August 1979.

A board of three lay appraisers was appointed pursuant to G.S. Chapter 160A, Article 11. The appraisers filed a majority report concurred in by two appraisers on 15 August 1979. The majority awarded net compensation of \$261,596 to the respondent landowners for the partial taking of 34.65 acres from their 705.9 acre tract. The minority report, filed on the same date, awarded

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net compensation of \$76,535. The county estimated damages for the taking in accordance with the minority report and appealed from the award of compensation of \$261,596 to the Superior Court for trial *de novo*.

In May and June of 1982, a jury trial was held upon the issue of the amount of just compensation respondents were entitled to for the partial taking of their property. The jury fixed compensation at \$94,600. The respondents' motion to set aside the verdict as contrary to the weight of the evidence was denied. Judgment was entered upon the verdict and respondents appeal.

Johnson and Johnson, P.A., by W. A. Johnson, for respondent appellants.

Woodall, McCormick & Felmet, P.A., by Edward H. McCormick and L. Holt Felmet, for petitioner appellee.

JOHNSON, Judge.

This appeal arises out of a condemnation proceeding. The petitioner, Harnett County (the County) took 34.65 acres from respondents' 705.9 acre tract of land for an airport. The respondent landowners appeal from the award of \$94,600 in damages for the partial taking. The questions presented concern whether the trial court erred in its evidentiary rulings, erred by expressing an opinion on the evidence, and erred in failing to set aside the verdict on the issue of compensation. We find no error and affirm.

I

The evidence presented at trial showed that on 12 June 1979, and for several years prior thereto, respondent W. R. Sorrell owned a one-half (1/2) undivided interest and respondent R. D. Lee and several members of his family owned the other one-half (1/2) undivided interest in a 705.9 acre tract of land in Neill's Creek Township, Harnett County. The land is about one mile east of Campbell University, a few hundred yards south of U.S. Highway 421.

At a time when R. D. Lee owned the entire tract (March, 1967), Lee negotiated a lease granting to respondent Becker Sand and Gravel Company, Inc. (Becker) the right to mine and remove sand and gravel from the 705.9 acre tract. Under the terms of the

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lease, Becker paid no money to the lessor at the time the lease was executed. A royalty agreement was included in the lease, under which Becker was to pay Lee ten cents (10¢) per ton for gravel and five cents (5¢) per ton for sand at the time of mining. The lease was for a term of 30 years, with an option to renew for 20 more years at no front end charge. At the time of the taking, Becker had not mined any sand or gravel on the tract and had not given notice of an intent to mine.

Subsequent to execution of the mineral lease, ownership of a one-half interest in the subject tract passed from R. D. Lee to Dr. W. R. Sorrell. At the time of the taking in 1979, certain of R. D. Lee's children, who farmed the land with him, also owned fractional interests in the land, and the group of other condemnees includes holders of security interests, trustees under Deeds of Trust and a representative of a trustee under one Deed of Trust.

Becker Sand and Gravel had been mining sand and gravel deposits on the opposite side of the Cape Fear River from the subject tract since 1953 and had an existing processing plant there. Other than the Lee-Sorrell tract, Becker had no deposits tied up by either lease or purchase on the immediate opposite side of the river from its existing plant and Becker had no processing plant on that side of the river.

At the time of the taking, the Lee-Sorrell tract was being used for the cultivation of row crops, tobacco, cotton, corn and soybeans. There was also some pasture land. About 350 acres were cleared and in cultivation. The R. D. Lee residence was located on the tract near the 34.65 acre portion taken for the airport. The taking included 800 feet of road frontage on a rural paved road known as Old Stage Road. Additionally, the County closed 1000 feet of a dirt road which previously ran across airport property to the Old Stage Road. However, a new 3000 foot paved access road was constructed down the edge of airport property, which joined the remaining portion of the dirt road at the Lee home.

The original majority report of appraisers Owens and Joyner, which fixed compensation at \$261,596, and the minority report of Bobby Wicker, which fixed compensation at \$76,535, were read to the jury in their entirety. Additionally, appraisers Owens and Wicker testified at trial. Owens testified that his friend Dr. Sor-

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rell had asked him to be an appraiser and "represent him on his side"; that he had taken the values for both mining *and* farming into account in his appraisal; but conceded that the fields could not be both mined and farmed at the same time.

In addition to the two members of the board of appraisers, the jury heard widely diverse opinions about damages to the property which resulted from the taking. The landowner's other witnesses included:

1. W. R. Sorrell (landowner), who testified, *inter alia*, that before the airport was placed there, the owners could have sold 25.5 acres along the paved and unpaved road for \$3,000 per half acre as building lots, and that the land taken which was off the road was worth \$3,000 per acre; further that additional acreage had been reduced in value. He assessed total damages at \$370,000. Sorrell did not take the sand and gravel into consideration in fixing the damages.

2. Charles B. Lee (landowner) testified to an amount and manner of arriving at damages which was similar to Sorrell's, and Lee assessed damages at \$367,000; Lee also failed to take the sand and gravel into account in fixing the damages.

3. O. F. Patterson, III, a geologist, testified that he had been employed only to appraise the sand and gravel affected by the taking. He testified that in addition to the 34.65 acres taken, 40 acres to the east was rendered unminable by the taking. Patterson testified that the market royalty rate in this area in August, 1979 was 10-12 cents per ton for sand and 18-25 cents per ton for gravel. He testified that in his opinion the sand and gravel under the airport tract and the 40 acres to the east had a value of \$560,500 which he arrived at as follows:

—Total tons sand, 1,700,000 × 25¢	437,500
—Total tons gravel, 486,000 × 25¢	<u>121,500</u>
TOTAL	559,000

Value witnesses for the County other than Mr. Wicker, who was a member of the board of appraisers, included:

1. Mr. James Snipes, a member of the Society of Real Estate Appraisers and operator of a real estate business in Dunn,

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North Carolina. He gave his opinion that the highest and best use of the tract was for crop production, timber growing and some residential use. Snipes testified that he had appraised the subject properties using the market data approach before and after the taking and that in his opinion the damages were \$88,000. Snipes testified further that the market for residential lots in the area of the taking was limited, as evidenced by a subdivision one-half mile away which had been under development for six to nine years and had only eight to ten houses on it.

2. Mr. Charles M. Hartsock, a member of the American Institute of Real Estate Appraisers and operator of a real estate business in Raleigh, North Carolina testified that in his opinion, the highest and best use of the tract of land was as a farm. Hartsock testified that he had considered mining sand and gravel as an alternative use. In appraising the land for mining, he had used the income streaming approach; that to analyze investment mining properties one had to know the quantity of minerals, the market royalty rate and the length of time it would take to mine the tract. In Hartsock's analysis he used the quantities and royalty rates testified to by respondents' witness Patterson and estimated the time involved based on his judgment, backed by testimony he heard regarding the number of acres that could be mined per year. Using the income streaming method, he arrived at a value of approximately \$1300 per acre for the land as mineral land. Hartsock then repeated that in his opinion, the highest and best use of the land before and after the taking was for farming and that the damages were \$97,100.

In addition to value witnesses, the jury heard testimony from Mr. Steve Howiler, currently vice president of operations for Becker Sand and Gravel Company. Mr. Howiler testified on behalf of respondents that in his opinion, it was economically feasible to mine the Lee-Sorrell tract. Through Howiler, respondents introduced Becker's original log sheets on test holes drilled, color coded plats and other business records which related to the tract which had been prepared in 1967, at the time the lease was negotiated.

The County called Mr. Clarence Gelder, who testified that he had worked for Becker Sand and Gravel Company for 22 years

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prior to going into a business of his own. Gelder testified that he had been a vice president of Becker and that in 1953, he had located the deposit of sand and gravel immediately across the Cape Fear River from the Lee-Sorrell tract, which deposit Becker was still mining. This operation was known as the Senter Plant. Gelder testified that he negotiated the 1967 lease with R. D. Lee and that the drilling records, maps, and test data sheets introduced by respondents had been done under his supervision at Becker. In Gelder's opinion, it had not been economically feasible to mine the Lee-Sorrell tract in 1967. Gelder stated that he decided to negotiate the lease because it provided him a chance to hold a base of 700 acres for 50 years at no cost and that it was possible that the tract might be in the middle of additional tonnage which was not then known. Gelder testified that on the basis of the 1967 test hole data, it was his opinion that on the condemned 34.65 acres, there were only 8 acres that contained a sand and gravel deposit and that it contained 8000 tons of gravel per acre, and twice that quantity of sand. Further, that in his opinion, it was still not economically feasible to mine the Lee-Sorrell tract in 1979.

II

[1] The respondent landowners contend that the trial court erred when it allowed into evidence, "a substantial quantity of irrelevant, incompetent and prejudicial evidence over the objection of the respondents." Most of the testimony objected to came from the witness Clarence Gelder and concerned the question of the feasibility of mining the sand and gravel deposits on the Lee-Sorrell tract. Respondents have listed ten specific areas of inquiry which they argue petitioners were prejudicially allowed to pursue on both cross-examination and rebuttal. These are as follows:

- A. The mining operation at the Senter Plant.
- B. The overburden at the Senter Plant.¹
- C. The sand and gravel on a tract nine miles south of Fayetteville.
- D. The total gravel tonnage on the Lee-Sorrell property.

1. "Overburden" is the amount of material above the deposit to be removed.

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E. The amount of sand on the Lee-Sorrell property.

F. The market ratio between sand and gravel.

G. The size of the Lee-Sorrell deposit and that it was not economically feasible to construct a processing plant on the property in 1967.

H. Why the Lee-Sorrell property was leased.

I. The cost of \$150 a hole to drill the sixty-two test holes on the Lee-Sorrell property on or about 24 August 1979.

Respondents primarily take issue with the admission of Gelder's testimony regarding the economic feasibility of constructing a processing plant on the Lee-Sorrell property in 1967 and the testimony regarding the circumstances of Becker's lease of the mining rights at that time. We find no error.

It was the jury's duty in this case to determine whether the value of the Lee-Sorrell tract was affected by the mineral deposit underlying it. In order to make this determination, they had to know whether mining the deposit was economically feasible. The question of the economic feasibility of mining the deposit, the related questions of the economic feasibility of building a processing plant on the site before the taking in 1979, as well as the feasibility of processing the subject minerals through the nearby Senter Plant had all been raised by respondents during their case in chief through witnesses Patterson and Howiler. Cross-examination on every phase of examination in chief "is an absolute right and not a mere privilege." *Riverview Milling Co. v. Highway Commission*, 190 N.C. 692, 696, 130 S.E. 724, 726 (1925). Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially. *Highfill v. Parrish*, 247 N.C. 389, 100 S.E. 2d 840 (1957). Therefore, the general subject of the economic feasibility of mining the Lee-Sorrell mineral deposit and of processing the minerals extracted therefrom was both relevant and open to cross-examination and rebuttal by the County.

Respondents, however, argue that admission of Gelder's opinion that on-site construction of a processing plant in 1967 was ir-

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relevant and prejudicial because it was likely to have had a negative impact on the jury's assessment of the 1979 value of the sand and gravel deposits. Further, that this testimony, as well as Gelder's opinion that it was also economically infeasible to build a processing plant on the property in 1979, could have caused the jury to conclude that the minerals would not be mined and therefore to exclude their value in their award of compensation. We find no prejudice by reason of admission of this testimony.

Again, respondents first raised the issue of the economic feasibility of such a plant in their examination in chief. Mr. Howiler had testified on direct examination that before the taking, in his opinion, it would have been economically feasible to mine the deposit by building an on-site processing plant. Gelder's testimony, then, constituted permissible rebuttal evidence on this issue. *Highfill v. Parrish, supra*. Furthermore, Gelder had previously laid the foundation for the relevance of his testimony concerning the feasibility of an on-site plant in 1967. Gelder testified that his work since leaving Becker in 1970 involved the use of sand, gravel and crushed stone and that he was concerned about the quality of his materials. In later testimony Gelder stated that he had been involved in the design of such a plant in 1979. He testified that there had been no significant changes in the methods by which one would set up a plant operation since 1967 and that the component parts for a plant had not become cheaper since then either. The testimony elicited would, therefore, have been relevant had the County presented it in its case in chief, and was also entirely proper as rebuttal evidence.

Much the same may be said of Gelder's testimony concerning Becker's original intention in negotiating the mineral lease. Respondents orally argued that this testimony was irrelevant and prejudicial because the fact that Becker did not pay anything for the lease would lead the jury to believe that the property was worthless. Again, the subject of the motivation for Becker's original lease was addressed by respondents during their case in chief. On direct examination, Mr. Howiler testified that the rights to the minerals on the Lee-Sorrell tract were negotiated for reserve purposes and, as such, were of central importance to Becker. Further, that Becker had every intention of mining it. The testimony of Mr. Gelder that he negotiated the mineral lease because he had an opportunity to hold a lease on 700 acres for 50

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years at no cost and that the deposit might be in the middle of other deposits not then known was properly offered and admitted as rebuttal evidence. *Highfill v. Parrish, supra*. We have carefully examined the other testimony objected to by respondents and conclude that it too was properly admitted into evidence.

III

[2] Next, respondents contend that the trial court committed reversible error in allowing the expert witness, James Snipes, to give opinions which were based in significant part on hearsay evidence. We do not agree.

Mr. Snipes testified that he used the market data approach in making his appraisal for the County. Snipes then described the method in great detail; it is also known as the direct sales comparison method and, by its very nature, uses information from others. Snipes, then, using the market data approach, determined that the highest and best use of the owners' land was farming and not sand and gravel mining. This opinion was based upon facts he obtained in his market data investigation.

The testimony objected to came in response to questions regarding Snipes' investigation of other possible uses for the property than farming.

Q. And what uses were they?

A. Well, mineral rights, sand and gravel. I was given information and read the existing lease on the property for minerals and gravel at that time. I investigated and talked with knowledgeable sources about the potential—

MR. JOHNSON: Objection.

THE COURT: Overruled.

THE WITNESS: —of it for that.

Q. And what was your basis for arriving at the opinion that the highest and best use of the property was farming and limited residential?

A. Based on—

MR. JOHNSON: Objection.

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THE COURT: Overruled.

THE WITNESS: My information indicated that rural farmland comparable to the subject that was being sold for mineral rights—that use was not bringing nearly as much per acre as farmland was bringing.

Respondents argue that Snipes' partial reliance on hearsay rendered his expert opinion on the most critical issue in the case inadmissible. Specifically, they contend that there is no way to determine whether this hearsay was valid, accurate, reliable or relevant and that to the extent it was incorrect, the testimony of Snipes based on it was incorrect.

Respondents rely upon *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971) and *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967) to argue that an expert cannot base his opinion on hearsay. However, as noted in 1 Brandis on N.C. Evidence, § 136, n. 27 (2nd Rev. Ed. 1982), the rule of *Todd* has effectively been overruled by *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). In *Wade*, the court held that a physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied to him by others, including the patient, if such information is inherently reliable, even though it is not independently admissible into evidence. See also *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). In addition, if his opinion is admissible, the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. *State v. Wade, supra*; *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957). An expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible. *State v. DeGregory, supra*; *Ballenger v. Burris Industries, Inc.*, 66 N.C. App. 556, 311 S.E. 2d 881 (1984) (information concerning patient's brother's genetic disease obtained from another physician is inherently reliable hearsay and is properly received into evidence to show the basis of the expert's opinion).

In the case under discussion, Snipes explained that by its nature, the "market data" or "direct sales comparison" method depends on information from others.

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Q. How did you select your comparables?

A. I got them from what we call the market, go out and seek sales, talk to people knowledgeable that know where a farm sale has been in the past six to twelve, fifteen months, talk to buyers and sellers, attorneys that have handled sales, selling agents who have handled farmland.

On cross-examination, Snipes explained this method of using comparables as follows:

Q. So, then, what you have given the jury is what somebody else told you rather than what you know?

A. Well, I went by expert knowledge. I went by other sand and gravel people who had bought farmland in Harnett County one year prior to this for sand and gravel mineral rights that sold for six to nine and twelve hundred dollars an acre, where farmland was selling for eighteen and nineteen hundred dollars an acre.

We conclude that the hearsay relied upon by the expert witness Snipes in forming his opinion was inherently reliable for the following reasons:

1. The hearsay itself was from disinterested persons—sand and gravel people—who were not party to the lawsuit.
2. The investigation included the experiences of more than just one “sand and gravel” person.
3. The hearsay involved is routinely sought as the basis for a standard method of appraising real estate, i.e., the market data method. The market data or comparable sales method is one of the standard methods, according to Snipes, by which professional real estate appraisers gather data from others which they use to form an opinion on value.

Accordingly, Snipes' expert opinion was admissible on the question of the highest and best use of the subject property as well as on the question of value. It was properly left for the jury to weigh its reliability. Furthermore, the testimony could not have been prejudicial to respondents since the point was also made by Charles Hartsock, who, by use of a different method, came to essentially the same conclusion as Snipes on the question of land use and value.

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IV

[3] Respondents also contend that the trial court committed reversible error by expressing an opinion in violation of G.S. 1A-1, Rule 51(a). Specifically, they argue that the court expressed an opinion by its questioning of the County's expert witness Clarence Gelder, and by qualifying him as an expert in the presence of the jury. Respondents rely on *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E. 2d 861 (1966) and *Rannbury-Kobee Corp. v. Machine Co.*, 49 N.C. App. 413, 271 S.E. 2d 554 (1980) for the proposition that the trial court's declaration in the presence of the jury that a witness is an opinion on the credibility of the witness in violation of G.S. 1A-1, Rule 51(a).

The record reveals that the County attempted to offer Mr. Gelder as an expert in three areas. The court accepted Gelder as an expert in the area of sand and gravel mining operations and in the area of the economic feasibility of establishing a mining operation. However, there was some confusion over the third area, which concerned the testing of sand and gravel deposits (quantum testing to determine the percentage of sand and gravel at each level of depth). After the County attempted unsuccessfully to qualify the witness in this area, the court asked the witness a series of questions and, apparently satisfied with the results, declared Gelder to be an expert in each of the three areas. Respondents argue that the court's questions went beyond clarification and, together with the declaration, prejudiced their position with respect to the important issues of the case. We do not agree.

First of all, the record shows the questions propounded by the court to have been straightforward and clearly asked for the purposes of clarification. Secondly, the declaration of Gelder as an expert in the testing of sand and gravel deposits did not constitute an impermissible expression of judicial opinion on his credibility.

It is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case and to have as well an equally unbiased and properly instructed jury. This right can neither be denied nor abridged. . . . Any remark of the presiding judge made in the presence of the jury which has a tendency to

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prejudice the jury against the unsuccessful party may be grounds for a new trial. (Citations omitted.)

Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103, 310 S.E. 2d 338, 344 (1984). Significantly, after stating these maxims, the court continued as follows:

However, remarks made by the trial court in the jury's presence do not always constitute prejudicial error. Judges are not merely mute observers of the legal drama before them. They are the most important participants in the search for truth through trial by jury. (Citations omitted.)

In *Colonial Pipeline*, the trial court's comment upon witness testimony that, "I don't believe that is relevant" was held not to constitute prejudicial error. In the case at bar, the trial court's manner of examining the expert witness with regard to his qualifications was absolutely neutral and in no way prejudicial to respondents. Nor can the declaration of Gelder to be an expert in the presence of the jury be taken as prejudicial error.

Galloway v. Lawrence, *supra*, relied upon by respondents, involved a medical malpractice action wherein the defendant physician testified as a witness in his own behalf. The Supreme Court held that the trial court inadvertently erred in making a statement in the presence of the jury. The statement indicated that the court found as a fact that the defendant is "an expert physician in surgery." The court reasoned that the ruling should have been made in the absence of the jury because it was an expression of opinion with reference to the professional qualifications of a defendant in a professional malpractice suit and, as such, "might well have affected the jury in reaching its decision that the [plaintiff] child was not injured by the negligence of the defendant." 266 N.C. at 250, 145 S.E. 2d at 866. *Rannbury-Kobee Corp. v. Machine Co.*, *supra*, also relied upon by respondents, involved a breach of contract claim and was decided under the rule of *Galloway*. Although the witness in *Rannbury-Kobee* was not himself a party to the actions, the record established that he was the president of the defendant Company; he had negotiated the subject contract with plaintiff; he had designed the machine which was the subject of the contract according to plaintiff's specifications; and he had supervised, tested and delivered the machine as well as having billed the plaintiff for it.

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Clearly, the declarations by the trial court that the defendant in *Galloway* and the witness in *Rannbury-Kobee* were experts in their respective fields constituted prejudicial error, since the declarations dealt with the very question which the jury was called upon to decide—professional competency. Here, the witness involved was not a party to the litigation and declaring him to be an expert in no way touched upon any question which the jury had to decide. The qualification of Gelder as an expert with respect to quantum testing in no way harmed the respondents since the County did not challenge the quality of the sand and gravel on the Lee-Sorrell tract. It only sought to challenge the quantity determinations made by their witness, Russ Patterson. Therefore, under the circumstances of this case, we find no prejudicial error by virtue of the trial court's stating its ruling in the presence of the jury. *See also Speizman Co. v. Williamson*, 12 N.C. App. 297, 183 S.E. 2d 248, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 113 (1971) (*Galloway* rule not applicable to non-party expert witness).

V

[4] Finally, respondents contend that the trial court committed reversible error in denying their motion to set aside the verdict and in entering the judgment thereon because the compensation awarded by the jury was "grossly inadequate." Respondents argue that in view of the evidence presented by the parties, "it seems apparent that the jury either ignored this evidence, ignored the instructions of the court, was improperly affected by the opinions expressed by the court during the course of the trial, or by some other unknown and undiscoverable prejudice against the respondents."

To the contrary, we find it clear from the record that competent evidence was presented to the jury to support a conclusion that the highest and best use of the subject lands was not mining and that open face mining of sand and gravel was inconsistent with other uses such as farming and limited residential. The amount of compensation awarded was consistent with such a conclusion. Although the testimony given on value was widely divergent, the jury, as the trier of fact, was entitled to pass upon the weight and the credibility of the testimony of the various witnesses, and to make its decision accordingly. The jury was in-

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structed that they had the right to believe all, part or none of what any witness said. We find no evidence of prejudice to the respondents in the record of either the "known" or "unknown and undiscoverable" variety.

The respondents have not demonstrated that the trial court abused its discretion in refusing to set aside the verdict in view of the evidence presented. See *Goldston v. Chambers*, 272 N.C. 53, 157 S.E. 2d 676 (1967). The fact that the landowners introduced evidence of damages in amounts exceeding the award does not show such an abuse of discretion, because the jury is not compelled to accept the respondent landowners' testimony with respect to their damages. *Brown v. Griffin*, 263 N.C. 61, 138 S.E. 2d 823 (1964). Accordingly, the trial court did not commit reversible error in entering and signing the judgment in this cause.

In conclusion, we have carefully examined the arguments presented and conclude that the respondent landowners had a fair and impartial trial, free from prejudicial error.

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

JIMMY BERNARD GREEN, BY HIS GUARDIAN AD LITEM, BARBARA ANN GREEN, AND JAMES VERNON GREEN AND WIFE, BARBARA ANN GREEN
v. A. KELLY MANESS, JR.

No. 8318SC951

(Filed 3 July 1984)

1. Trial § 3.2— medical malpractice action—motion for continuance improperly denied

The trial judge erred in denying plaintiffs' motion for a continuance in a medical malpractice action when defendant brought forth a new expert witness with a new defense theory virtually on the eve of trial. While defendant at least arguably acted in good faith, it did not remedy the substantial probability of unfair surprise and prejudice to plaintiffs in that the medical expert's testimony was highly probative on the causation issue, and the full impact of his testimony was not revealed until the trial was well underway. G.S. 1A-1, Rule 26(e)(1) and G.S. 1A-1, Rule 37.

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2. Physicians, Surgeons and Allied Professions § 20.2— separate issues on negligence and causation—no abuse of discretion

It is permissible to submit separate issues on negligence and causation, in the exercise of the trial court's discretion, provided the jury is adequately instructed on the issues submitted.

3. Evidence § 14— physician-patient privilege—waiver

A trial court may override the physician-patient privilege and compel disclosure "if in his opinion [disclosure] is necessary to a proper administration of justice," and when a patient voluntarily testifies in detail about his injuries and his medical treatment, he waives the privilege, and the adverse party may examine the physician. G.S. 8-53.

Judge PHILLIPS concurring.

APPEAL by plaintiffs from *Hobgood, Hamilton H., Judge*. Judgment entered 25 June 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 April 1984.

Plaintiffs brought this medical malpractice action against defendant obstetrician seeking damages for permanent and severe brain damage suffered by the minor plaintiff, allegedly as a result of defendant's negligent acts or omissions during delivery. They alleged that the following acts or omissions by defendant caused the minor plaintiff, who was born with cerebral palsy after a long and complicated delivery which defendant attended, to be deprived of oxygen during birth, thereby damaging his brain: (1) failure to accomplish delivery until forty-one minutes after the birth of the minor plaintiff's twin brother, (2) premature rupture of the minor plaintiff's amniotic sac, (3) improper use of the anesthetic drug cyclopropane, (4) improper use of the drug pitocin for stimulating contractions in the mother, (5) failure to monitor the fetal heart rate, (6) negligent examination of the mother, and (7) inadequate preparation for the delivery.

Testimony from plaintiffs' expert medical witnesses tended to support these allegations of defendant's negligence. Defendant's experts testified, however, that defendant had conformed to acceptable standards of medical care for that community at that time, and that the minor plaintiff's cerebral palsy was caused by a congenital defect instead of by oxygen deprivation during birth.

The trial court submitted separate issues on negligence, causation, and damages. The jury found defendant not negligent and therefore did not address the other issues.

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Plaintiffs appeal.

Clark & Wharton, by David M. Clark and John R. Erwin, for plaintiff appellants.

Tuggle, Duggins, Meschan & Elrod, by Joseph E. Elrod, III, and J. Reed Johnston, Jr., for defendant appellee.

WHICHARD, Judge.

[1] Plaintiffs contend they suffered prejudicial surprise when defendant brought forth a new expert witness with a new defense theory virtually on the eve of trial, and that the court thus erred in denying their motion for a continuance to enable them to prepare to meet the resultant changed conditions. While (1) a motion to continue ordinarily is addressed to the sound discretion of the trial judge, and (2) continuances are not favored, and parties seeking them have the burden of showing sufficient grounds therefor, the chief consideration to be weighed in passing on the motion is whether its grant or denial will be in furtherance of substantial justice. *Shankle v. Shankle*, 289 N.C. 473, 482-83, 223 S.E. 2d 380, 386 (1976). A party who is unprepared for trial as a result of changed conditions may be entitled to a continuance as a matter of right. *See Watson v. Black Mountain Railway Co.*, 164 N.C. 176, 181, 80 S.E. 175, 177 (1913); *Dobson v. Southern Railway Co.*, 129 N.C. 289, 291, 40 S.E. 42, 43 (1901). Our Supreme Court has found error in the denial of motions for continuance where a party, for reasons not of its own making, was unprepared for trial. It has held such parties entitled to a continuance, and has awarded new trials in such situations when "the ends of justice" required it. *Shankle, supra*; *Smith v. Bryant*, 264 N.C. 208, 141 S.E. 2d 303 (1965). Because we find substantial probability of prejudice to plaintiffs here from denial of their motion for continuance, we hold that, as in *Shankle*, "the ends of justice" require a new trial.

The facts pertinent to decision on the continuance motion are as follows:

The minor plaintiff's mother gave birth to twin sons on 3 August 1974. The first-born was the product of an uneventful delivery and is a normal child. The birth of the second-born, the minor plaintiff, did not occur until forty-one minutes after the

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birth of the first-born. The minor plaintiff did not breathe spontaneously for about thirty minutes after birth. A complete medical examination three days later showed that he suffered from neurological deficit, or brain damage.

The physician in charge of the examination recorded the impression that the minor plaintiff had undergone "severe intrauterine asphyxia," *i.e.*, a severe lack of oxygen during the birth process. At the time of trial the minor plaintiff, then eight years of age, suffered from cerebral palsy and was significantly handicapped.

Jury selection for trial of this case was set for 3-4 June 1982, with presentation of evidence to commence on 7 June 1982. Shortly before those dates, on 14 May 1982, defendant, while flying to a medical school meeting in Philadelphia, coincidentally met Dr. Allen Roses, Professor and Chief of the Division of Neurology at Duke University Medical Center. Defendant and Dr. Roses discussed this case, and Dr. Roses offered to review the medical records pertinent to it. Counsel for defendant delivered these records to Dr. Roses on 19 May 1982. On 25 May 1982 Dr. Roses advised defense counsel that in his opinion the minor plaintiff's palsy could have been caused by a preexisting condition or congenital anomalies. None of defendant's anticipated witnesses had so opined previously. Defendant himself had mentioned in his deposition only the "possibility" of an intracranial defect which would take an examination of the child and the testimony of a neonatologist or neurologist to establish. During the pretrial period, defendant made no request for examination of the child and listed no neonatologist or neurologist as a witness.

On 25 May 1982, the day he was informed of Dr. Roses' opinion, defense counsel filed a supplemental response to plaintiffs' interrogatories indicating Dr. Roses' opinion and the possibility that he would be called as an expert witness for defendant. Plaintiffs made arrangements to depose Dr. Roses as soon as possible. Meanwhile, on 1 June 1982, all parties signed the order on final pretrial conference, which had been revised to include Dr. Roses as a potential defense witness.

On the night of 1 June 1982 plaintiffs deposed Dr. Roses. The witness stated that the medical records showed that two brain taps had been performed on the minor plaintiff shortly after his

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birth. The taps revealed subarachnoid fluid in the subdural region. Dr. Robert G. Dillard, a treating physician and defense witness, and other experts, had attributed no significance to the results of the taps when they were performed. Dr. Roses testified, however, that the fluid drawn in the brain taps was indicative of a congenital deformity—a view subsequently adopted by Dr. Dillard at trial. Counsel for plaintiffs felt that he was “faced with the position of educating [him]self on a new area of medicine” due to Dr. Roses’ introduction of “an entirely new medical concept” immediately before the trial began.

As noted, jury selection was slated to begin on 3 June 1982, only a little over a day after plaintiffs took Dr. Roses’ deposition. Plaintiffs moved for a continuance, or in the alternative to exclude Dr. Roses’ testimony. They argued that the late disclosure of defendant’s new theory of congenital deformity, which would have eliminated negligence in the delivery process as the cause of the minor plaintiff’s cerebral palsy, had left them unprepared. They had not even received the transcript of Dr. Roses’ deposition at the time the motion for a continuance was made, and their experts thus had not had an opportunity to evaluate his opinion.

Counsel for plaintiffs argued in support of the motion for continuance: “In order to represent the child, I’ve got to be prepared on the testimony.” He further noted that plaintiffs’ expert, Dr. William McLean, with whom they hoped to rebut Dr. Roses’ opinion, was scheduled to be out of the country after 17 June 1982. Since it was anticipated that the trial would last beyond that date, plaintiffs thus would lose their chance to rebut the damaging testimony of Dr. Roses unless they called him as their witness. The denial of a continuance ultimately forced plaintiffs to choose that tactic, which allowed Dr. Roses to testify both before and after the plaintiffs’ expert neurologist.

In moving for a continuance plaintiffs also expressed concern that defendant would enlarge the problem by calling other experts at trial to testify on the issue raised by Dr. Roses. This concern proved well-founded, as Dr. Dillard changed his opinion on the brain tap results to echo Dr. Roses’ theory; and two other witnesses were called unexpectedly to elaborate on other aspects of Dr. Roses’ testimony.

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The problem was further enlarged in Dr. Roses' actual trial testimony, when he propounded yet another theory as to why defendant's acts probably did not cause the minor plaintiff's cerebral palsy. He testified that the minor plaintiff had a form of cerebral palsy known as ataxia, which he stated was caused in 90% of the cases by a congenital defect. Defendant, as well as plaintiffs, professed surprise at this new diagnosis expressed for the first time during trial. Defense counsel successfully used his surprise at this unexpected favorable testimony as a basis for calling two more expert witnesses, not listed on the pretrial order, to support Dr. Roses' diagnosis of ataxic cerebral palsy.

In opposition to the motion for continuance, defendant observed that his experts had denied causation from the beginning; and that the hospital discharge records stated that the minor plaintiff may have suffered from a congenital defect as well as oxygen deprivation. He pointed out that the late disclosure of Dr. Roses and his opinion on causation was due to chance, not to any concealment or bad faith surprise tactics on defendant's part. Citing *Shankle, supra*, he argued that continuances are not favored and lie within the sound discretion of the trial court. He maintained that plaintiffs should have anticipated the type of testimony presented by Dr. Roses, since causation is an obvious issue in a negligence action.

At one point during argument on the motion the court stated: "Now, of course, I take a rather dim view of [defense counsel's] position on bringing in a doctor this late in the trial procedure, because I realize there are certain rules." Ultimately, however, the court stated: "I came up here in order to try the case so I'm planning to try it." It then denied the motion to continue. Subsequently, after reading Dr. Roses' deposition, it denied plaintiffs' alternative motion to exclude Dr. Roses' testimony.

We find the decision allowing Dr. Roses to testify proper. The search for truth and "the ends of justice" generally require that a key expert medical witness be permitted to testify in a medical malpractice action. See *Shepherd v. Oliver*, 57 N.C. App. 188, 190, 290 S.E. 2d 761, 763, *disc. rev. denied*, 306 N.C. 387, 294 S.E. 2d 212 (1982). In *Shepherd*, however, this Court recognized the possibility of unfair surprise when one party calls an expert witness at trial with little advance notice to the other. It ob-

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served that the trial court could solve this problem by "allow[ing] the [adverse party] an opportunity to prepare for this witness by granting a continuance or an opportunity to take a deposition." *Id.*

While plaintiffs here were allowed to depose Dr. Roses, the particular circumstances nevertheless resulted in unfair surprise and denied plaintiffs adequate preparation for trial. Dr. Roses' deposition and defendant's supplemental response to interrogatories, which were vague and late in the discovery process, did not sufficiently narrow the causation issue and did not present it sufficiently soon to enable plaintiffs to prepare cross-examination and rebuttal effectively. The unavailability prior to trial of a transcript of Dr. Roses' deposition testimony considerably diminished its utility for trial preparation. As noted, even defendant expressed surprise at the manner in which the causation issue developed during trial.

In *Shankle* our Supreme Court stated, in awarding a new trial on the ground of error in the denial of a continuance: "It is patent that neither side was prepared for the trial . . . ; that the evidence was not developed, and the issues which will determine the merits of the controversy were never defined." *Shankle, supra*, 289 N.C. at 486, 223 S.E. 2d at 388. Here, as in *Shankle*, neither side was prepared on the causation issue prior to trial, and defendant's basis for attacking causation was not defined until after the trial commenced. Plaintiffs could not obtain adequate expert analysis of Dr. Roses' deposition testimony until after trial commenced, and even then were handicapped initially by the absence of a transcript of his testimony. The deposition, which was hastily taken near the eve of trial, did not disclose a crucial ground for Dr. Roses' opinion on causation, *viz*, his diagnosis of ataxia. Plaintiffs thus were placed in the awkward position of having to obtain a computerized tomography scan of the minor plaintiff after commencement of trial, and of presenting films of the scan to Dr. Roses for the first time during trial. In these circumstances it is evident that the deposition route suggested by *Shepherd, supra*, was inadequate to enable plaintiffs to prepare for Dr. Roses' crucial testimony at trial, and that only a continuance would have done so.

In a recent opinion this Court has addressed the problem of late-breaking discovery in complex medical malpractice actions.

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See *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E. 2d 90 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E. 2d 698 (1984). There, as here, the trial court did not have the benefit of North Carolina case law delineating the period during which new defense witnesses or theories of the case could be introduced. See 65 N.C. App. at 640, 310 S.E. 2d at 99. That decision awarded a new trial because the case had been set peremptorily for trial while discovery was incomplete, and the trial court thereafter had denied plaintiffs' motion to compel discovery. *Id.* at 642, 310 S.E. 2d at 100. The result was that plaintiff was unable effectively to cross examine defendants' expert medical witnesses.

The same result obtained here, not from denial of a motion to compel discovery, but from denial of plaintiffs' motion for continuance. The spirit of *Willoughby*, if not the letter, thus requires that plaintiffs here, like the plaintiff there, be awarded a new trial, to afford them the same opportunity for adequate trial preparation that was afforded the plaintiff there.

G.S. 1A-1, Rule 26(e) (1) provides:

A party is under a duty seasonably to supplement his response [to a discovery request] with respect to any question directly addressed to . . . (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Our courts and the federal courts have held consistently that the purpose and intent of this rule is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery. See cases cited in *Willoughby, supra*, 65 N.C. App. at 641, 310 S.E. 2d at 99-100. In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under G.S. 1A-1, Rule 37, to impose sanctions on a party who balks at discovery requests.

Nothing in this record indicates that defendant failed to respond with due diligence and in good faith to discovery requests regarding its expert witnesses. Defense counsel apparently notified plaintiffs' counsel immediately once he knew he intended to call Dr. Roses as a witness. Hence, no occasion for imposition of G.S. 1A-1, Rule 37 sanctions was presented.

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Defendant's supplemental response to interrogatories was not rendered "seasonable" within the meaning and intent of G.S. 1A-1, Rule 26(e)(1), however, by the mere fact that there was no occasion for imposition of sanctions. In *Willoughby* this Court defined "seasonable" in terms of the ability of the receiving party to prepare for trial, not in terms of whether the party providing supplemental information acted in good faith. It stated:

While we decline to state a mathematical formula to determine what is "seasonable," we find that supplemental answers to interrogatories are not seasonable when the answers are made so close to the time of trial that the party seeking discovery thereby is prevented from preparing adequately for trial, *even with the exercise of due diligence.*

Willoughby, supra, 65 N.C. App. at 641, 310 S.E. 2d at 100 (emphasis supplied). Because it focuses on adequate preparation and promotes full knowledge of the facts and issues before trial begins, this definition of "seasonable" accords with the philosophy of the Rules of Civil Procedure. See *Hickman v. Taylor*, 329 U.S. 495, 500-01, 67 S.Ct. 385, 388-89, 91 L.Ed. 451, 457 (1947); *Carpenter v. Cooke*, 58 N.C. App. 381, 384, 293 S.E. 2d 630, 632, *cert. denied and appeal dismissed*, 306 N.C. 740, 295 S.E. 2d 758 (1982); 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2001 (1970). A definition similar to that in *Willoughby* was proposed over twelve years earlier in the following statement: "The term 'seasonably' is difficult to understand. A test may be that the supplementation is made in time for the other party to take whatever action is necessary in preparation for trial." Clough, Rx for Defense—Aggressive Use of the Amended Federal Rules of Civil Procedure, 38 Ins. Counsel J. 354, 355 (1971).

In *Willoughby* the plaintiff learned of a new expert defense witness ten days before trial and deposed him one day before trial. *Willoughby, supra*, 65 N.C. App. at 642, 310 S.E. 2d at 100. Here plaintiffs learned of a new expert defense witness, with a significant new theory of causation, nine days before jury selection commenced; and they deposed him a little over one day before jury selection commenced. In both cases the depositions came too late to enable plaintiffs to prepare adequately for cross-examination and development of rebuttal evidence.

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In sum, defendant's supplemental response to plaintiffs' interrogatories, and plaintiffs' deposing of the new expert defense witness disclosed thereby, came too close to trial time to allow plaintiffs adequate time to prepare a response to the newly disclosed information. The information involved a complex medical issue which required lengthy analysis and consultation with experts. The supplemental response was inadequate in content. Plaintiffs' interrogatories had requested "[t]he substance of the facts and opinions to which each . . . expert is expected to testify and a summary of the grounds for each opinion." Defendant's response stated, in pertinent part: "Dr. Roses is of the opinion that [the minor plaintiff's] condition could be the result of a pre-existing condition and/or congenital anomalies that were in existence prior to the time of his delivery" This response failed to notify plaintiffs of the bases for the opinion, such as the abnormal fluid from the subdural tap, and the likelihood of ataxic cerebral palsy resulting from congenital defects.

While defendant at least arguably acted in good faith, this does not remedy the substantial probability of unfair surprise and prejudice to plaintiffs. Dr. Roses' testimony was highly probative on the causation issue, and the full impact of his testimony was not revealed until the trial was well underway. While the jury found no negligence, and thus did not reach the separate causation issue, the evidence regarding negligence and causation was inextricably intertwined. Dr. Roses testified that the birth delay was the result of the minor plaintiff's condition, not the cause of it. Both Dr. Roses and defendant based their opinions as to absence of negligence in part on the theory that the minor plaintiff's condition reflected a congenital defect, which occurred before delivery, and therefore could not have been the product of negligence by defendant. The issues of negligence and causation thus were so closely interwoven in the evidence that the probability that Dr. Roses' causation testimony affected the jury's verdict on negligence is substantial. While "[t]he jury's answer to one issue which determines the rights of a party may render exceptions concerning other issues moot [,] . . . 'error relating to one issue may not be disregarded when it is probable that it affected the answer to another.'" *Cockrell v. Cromartie Transport Co.*, 295 N.C. 444, 452, 245 S.E. 2d 497, 502 (1978) (quoting *Nello L. Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 533, 126 S.E. 2d 500, 508 (1962)).

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In awarding a new trial in *Willoughby*, *supra*, 65 N.C. App. at 642, 310 S.E. 2d at 100, this Court stated: "We are unable to say that plaintiff here was not prejudiced by an inability to adequately prepare for cross examination of defendants' expert witnesses." We are equally unable to say that plaintiffs here were not similarly prejudiced. We thus hold that both consistency with *Willoughby* and "the ends of justice," *Shankle*, *supra*, require a new trial for which plaintiffs have adequate opportunity to prepare.

Two of the remaining issues argued in plaintiffs' brief may well recur upon retrial. We thus offer the following observations regarding them:

[2] With regard to the first, *viz*, the contention that the court erred in submitting separate issues on negligence and causation, "[t]he number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967). Without judging the wisdom of submitting separate issues on negligence and causation, we believe such to be permissible, in the exercise of the trial court's discretion, provided the jury is adequately instructed on the issues submitted.

[3] With regard to the second, *viz*, the contention that the court erred "in violating the physician-patient privilege and other established rights of the minor plaintiff" by allowing certain physicians who had examined or treated the minor plaintiff to testify for defendant, we note that the trial court may override the physician-patient privilege and compel disclosure "if in his opinion [disclosure] is necessary to a proper administration of justice." G.S. 8-53. We note further that the physician-patient privilege may be waived. "That this purely statutory privilege may be waived is undisputed." Note, 16 N.C. L. Rev. 53, 54 (1937), *quoted in Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E. 2d 137, 141 (1960). The waiver may be express or implied. *Capps*, *supra*. When a patient voluntarily testifies in detail about his injuries and his medical treatment, he waives the privilege, and the adverse party may examine the physician. *Id.* at 23, 116 S.E. 2d at 141-42. One prominent commentator has stated that "the *bringing of an action*

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in which an essential part of the issue is the existence of physical ailment should be a *waiver* of the privilege for all communications concerning that ailment." 8 J. Wigmore, *Evidence* § 2389 (McNaughton rev. 1961); *see also* *Awtry v. United States*, 27 F. R.D. 399 (S.D.N.Y. 1961); Annot., 21 A.L.R. 3d 912 (1968 & Supp. 1983).

"The question of waiver is [, however,] to be determined largely by the facts and circumstances of the particular case on trial." *Capps, supra*, 253 N.C. at 23, 116 S.E. 2d at 141. If the issue presented arises upon retrial, the court should resolve it by application of the foregoing principles to the particular facts and circumstances as then presented.

The other issues presented are unlikely to recur upon retrial, and we thus do not consider them.

New trial.

Chief Judge VAUGHN and Judge PHILLIPS concur.

Judge PHILLIPS concurring.

The erroneous refusal to delay the trial and allow plaintiffs a fair opportunity to deal with the complex new medical theory that the court permitted defendant to present in evidence, though not mentioned during long and extensive discovery, was greatly enhanced and compounded by other errors that it led to. These included permitting defendant, because of his "surprise" at the depth and ramifications of Dr. Roses' testimony, to call two other unlisted experts to the stand, refusing to let an unlisted expert for plaintiffs testify that in his opinion the child was not congenitally deficient, but was injured during birth, and in refusing to permit plaintiffs to question certain witnesses of the defendant as the adverse hostile witnesses that they clearly were. Only the latter error will be discussed. Though permitting Dr. Roses to testify as to his congenital deficiency theory had the practical effect of virtually requiring plaintiffs to call him and Dr. Dillard, who had come to support the theory though of a different opinion earlier, to the stand near the beginning of the trial, the court refused to permit plaintiffs to question them as hostile witnesses. Under the provisions of Rule 43(b), N.C. Rules of Civil Procedure, a party has the legal right to interrogate hostile witnesses under

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the same conditions as though put on the stand by the opposing party. While determining whether a witness is hostile or not is normally within the trial court's discretion, the situation is otherwise when the evidence indisputably shows, as it did here, that the witnesses were hostile to plaintiffs. *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977).

The evidence shows without dispute that: Dr. Roses is an old college friend of defendant, and though a busy medical practitioner at the Duke Medical Center, he rearranged his affairs on very short notice so as to be of aid in connection with defendant's trial when and where needed; during that brief time he conferred with defense counsel, defendant, and his other expert witnesses, prepared for and gave his deposition at night, and was in Greensboro for the trial. Dr. Dillard, a professional neighbor and colleague of defendant's, was engaged by defense counsel to school and advise him about the medical problems in the case, the clear purpose of which was to defeat plaintiffs' case and exonerate the defendant. His situation was further compounded by the facts that: Though he had treated the infant plaintiff and thus owed him the same confidentiality that all doctors owe their patients, he, nevertheless, without being authorized to do so by either the plaintiffs or the court, discussed plaintiffs' claim with defense counsel and other expert witnesses, assisted in preparing the medical defense, permitted defense counsel to list him as a witness for defendant, and the opinion expressed immediately after the child's birth as to the cause of its condition was changed and he became a supporter of the belatedly developed congenital anomaly theory. Furthermore, the record shows that defendant's counsel even had the temerity during the course of discovery to formally notify plaintiffs' counsel by letter not to confer with his witness, Dr. Dillard, and that if he attempted to do so he would be reported to the grievance committee of the North Carolina State Bar; a course that the judge handling discovery ruled was a wrongful attempt on defendant's part to "immunize" Dr. Dillard from the plaintiffs. And, of course, both witnesses are highly trained, educated, experienced doctors that were obviously capable of taking care of themselves as witnesses in their field of practice, which is all they were to be questioned about. Under the circumstances, that plaintiffs could not even ask leading questions of these witnesses, while the defendant did, and could neither im-

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peach nor contradict the witnesses, as Rule 43(b) authorized, would warrant a new trial even in the absence of other errors, in my opinion. The case largely hinged on their testimony, which would probably have sounded materially different if it had been presented in the form plaintiffs were entitled to.

MARY CAROL RORRER v. ARTHUR O. COOKE

No. 8317SC702

(Filed 3 July 1984)

Attorneys at Law § 5.1— attorney negligence in medical malpractice case—genuine issue of material fact

The evidence on motion for summary judgment presented a genuine issue of material fact as to whether defendant attorney was negligent in his representation of plaintiff in a medical malpractice action by failing to obtain adequate expert consultation in evaluating plaintiff's claim, failing properly to cross-examine expert witnesses and failing properly to investigate, assemble and present relevant evidence at trial.

APPEAL by plaintiff from *DeRamus, Judge*. Judgment entered 28 March 1983 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 12 April 1984.

This is a legal malpractice action against defendant, a Greensboro attorney, arising from defendant's alleged negligence in representing plaintiff in a medical malpractice action. The executrix of defendant's estate was substituted as party defendant by order of this Court on 21 November 1983.

The uncontested facts show that on 25 October 1971 plaintiff underwent a tonsillectomy and adenoidectomy performed by Dr. Carl A. Sardi, a Greensboro otolaryngologist. Otolaryngology is the field of medicine involving treatment and surgery in respect to ear, nose and throat illnesses, disorders and diseases. Immediately after the surgery, plaintiff was unable to manipulate her tongue. She experienced considerable difficulty in both eating and talking. When this paralysis persisted, Dr. Sardi referred plaintiff to Dr. Joseph W. Steifel, a Greensboro neurologist. In February of 1972 plaintiff saw several otolaryngologists at Duke University Medical Center. Finally in March of 1972 plaintiff met

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with defendant to discuss bringing a malpractice action against Dr. Sardi.

On 7 June 1974 plaintiff filed a complaint against Dr. Sardi alleging that he failed to exercise due care in performing the tonsillectomy and adenoidectomy; that as a result of this failure permanent damage was inflicted upon that portion of plaintiff's nervous system which controls her tongue and that Dr. Sardi's negligent application of a tongue clamp was one of the proximate causes of plaintiff's injury and damage.

At the medical malpractice trial plaintiff and her husband testified that Dr. Sardi admitted to them that pressure from a tongue clamp used during surgery caused the injury to plaintiff's tongue. Dr. Sardi denied this admission. Plaintiff also presented the testimony of Dr. Steifel. The Greensboro neurologist testified that upon initially examining plaintiff he believed her paralysis was caused by some injury or involvement to the hypoglossal nerve, the nerve which controls the tongue's movement. On cross-examination, however, Dr. Steifel stated that after examining a subsequent pathology report on a biopsy of plaintiff's tongue, he found this report to be inconsistent with injury to the nerve.

Plaintiff then read into evidence the deposition of Dr. T. Boyce Cole, a Duke otolaryngologist who examined plaintiff in February of 1972. Plaintiff posed the following hypothetical question to Dr. Cole:

Do you have an opinion satisfactory to yourself as to whether or not the application of too much pressure on the plaintiff's tongue by a device utilized by the defendant during the course of the operation . . . could or might have resulted in impairment of her hypoglossal nerve, which, in turn, could or might have resulted in the immobilization of plaintiff's tongue . . . ?

Dr. Cole responded:

I think it may be possible to apply enough pressure to cause what we see, but I have never seen it in any other patient and have never heard of it And I would think it would be certainly unusual, and I don't really think that under the usual techniques of doing a tonsillectomy that you would exert enough pressure to cause this problem.

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Later in his deposition Dr. Cole testified that he did not know how a jury could conclude that Dr. Sardi applied excessive pressure to plaintiff's tongue, thereby causing the injury at issue.

Defendant presented his own testimony and that of Dr. William M. Satterwhite, Jr., a Winston-Salem otolaryngologist. Dr. Satterwhite was of the opinion that there was nothing Dr. Sardi did or did not do during the surgery which could have damaged plaintiff's tongue. The foregoing evidence was heard by a jury who found no negligence on Dr. Sardi's part.

On 26 August 1982 plaintiff filed a complaint against defendant. Therein she alleged:

8. Defendant was negligent in his representation of Mary Carol Rorrer and failed to apply the high degree of attention and care which he had agreed to in the prosecution of Mary Carol Rorrer's claim in the following respects:

- a. he failed to obtain adequate expert consultations from physicians qualified to evaluate plaintiff's claim;
- b. he failed to properly investigate, assemble and present relevant evidence at the trial;
- c. he failed to properly cross-examine Dr. Sardi concerning his treatment and evaluation of his patient;
- d. he failed to present the existing neurological evidence concerning plaintiff's tongue paralysis;
- e. he failed to properly cross-examine Dr. Satterwhyte, a defense witness;
- f. he failed to properly cross-examine Dr. Steifel;
- g. he failed to locate, subpoena and present the testimony of Carol Taylor, another patient of Dr. Sardi's who experienced the same type of tongue paralysis following the same type of tonsillectomy procedure;
- h. he failed to properly cross-examine Dr. Sardi concerning statements made by him to plaintiffs herein;
- i. he failed to offer into evidence conversations and office records of Dr. Rosen and failed to subpoena Dr. Rosen or any of his office records;

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- j. he failed to perfect an appeal from the judgment entered on the verdict even though notice of appeal was given and there was no conversation held between plaintiff and defendant concerning an abandonment of any appeal.

In his answer defendant denied any negligence and alleged "that in his representation of Mrs. Rorrer that he at all times exercised his best judgment, exercised good judgment, and exercised reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to all matters to the preparation of and prosecution of her claim." Defendant also moved for summary judgment supported by the record of the medical malpractice action and affidavits.

After considering defendant's motion for summary judgment and plaintiff's opposing affidavits, the trial court ordered that plaintiff's action be dismissed with prejudice. Plaintiff appealed.

McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Stephen P. Millikin and Alan W. Duncan, for defendant appellee.

ARNOLD, Judge.

The question presented on appeal is whether genuine issues of material fact exist. We hold that the affidavits filed by plaintiff in opposition to defendant's motion for summary judgment raise such issues.

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). When a motion for summary judgment is made, all materials before the court must be examined in the light most favorable to the nonmovant. The slightest doubt as to the facts entitles the nonmovant to a trial. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, cert. denied, 279 N.C. 619, 184 S.E. 2d 883 (1971). Upon examining the parties' pleadings, depositions, affidavits and record in the medical malpractice trial, we conclude that an issue of fact exists as to the negligence of defendant in his representation of plaintiff.

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In his motion for summary judgment, defendant alleged that there was no negligence on his part in preparing and prosecuting plaintiff's claim against Dr. Sardi. Defendant filed nine supporting affidavits, wherein he swore that he used his best judgment, acted in good faith and exercised reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to plaintiff's case. Defendant swore that it was his best judgment not to consult with, nor seek to obtain the testimony of, any otolaryngologist other than Dr. Cole. He swore that after considering the information furnished by plaintiff, her husband, the several doctors and all medical records, he was of the opinion that the best and only theory of injury was Dr. Sardi's placing too much pressure on plaintiff's tongue during surgery. As to his failure to locate Carol Taylor, a former patient of Dr. Sardi's who also suffered tongue paralysis, defendant swore that he was unable to locate Taylor after diligent efforts and that her testimony would not have been admissible or helpful.

Defendant also filed the affidavits of the judge who presided over the medical malpractice trial, two attorneys who represented Dr. Sardi during the trial and two Greensboro attorneys who have tried medical malpractice cases. These men examined the trial transcript, depositions, exhibits and defendant's affidavits. They swore that in their opinion defendant possessed the requisite degree of learning, skill and ability which other attorneys similarly situated ordinarily possess; that defendant exerted his best judgment in the handling of all matters on behalf of plaintiff and that defendant exercised reasonable and ordinary care and diligence in the use of his skill and the application of his knowledge throughout the medical malpractice trial.

Plaintiff filed opposing affidavits of Dr. Cole and attorney Tim L. Harris. Dr. Cole swore that he saw plaintiff in February of 1972 and could find no explanation for the cause of plaintiff's paralysis. Dr. Cole swore that he was later contacted by defendant concerning the medical malpractice suit. At that time Dr. Cole and defendant discussed defendant's theory of whether the clamp used during surgery could have placed sufficient pressure on plaintiff's tongue and, as a result, caused "ischemic damage" to the tongue. Dr. Cole swore:

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At that time, I told Mr. Cooke that I did not know what caused Mrs. Rorrer's tongue damage without knowing the details of the tonsillectomy procedure and I further told him that I thought it unlikely that a tongue retractor could exert enough pressure to produce this result. Mr. Cooke explained the purpose of a hypothetical question to me, and asked me to assume as a hypothetical fact, that sufficient pressure was, in fact, exerted to the tongue by the tongue retractor to impair blood flow. I explained to Mr. Cooke that, assuming an impaired blood flow from whatever cause, it could have produced the tongue damage. However, I reiterated to Mr. Cooke more than once that it was opinion that a tongue retractor could not place sufficient pressure on the tongue to cause ischemic damage. This explains my deposition testimony as to why I thought the tongue retractor theory to be an unlikely candidate for the tongue paralysis. I attempted to explain to Mr. Cooke that I could not support such a medical theory when he visited my office before taking my deposition.

Tim L. Harris, in his affidavit, swore that his legal practice involved medical malpractice cases and that he was familiar with the standards of practice of attorneys with similar background and experience in communities similar to Greensboro. Upon examining the medical malpractice record, exhibits, defendant's deposition and supporting affidavits, Harris reached the following opinion:

[D]espite Mr. Cooke's knowledge as to the weak nature of the testimony of Dr. Cole contained in his deposition, Mr. Cooke failed to subpoena or secure the testimony of the other attending physicians which she [plaintiff] had at Duke Hospital, including neurologists who ran electromyographic studies on her tongue which is an objective basis of proving nerve damage in the tongue and other medical witnesses. . . .

On balance, and after having carefully considered the matter and the time of the trial, it is my opinion that the failure of this case was due to the fact that no medical witness supported, in any convincing manner, the medical theory which Mr. Cooke advanced at the trial. This medical theory also hampered Mr. Cooke in the cross-examination of the de-

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endants expert witnesses. Being tied to a medical theory which was not accepted by any medical witness who gave testimony in the case was an overwhelming reason why the jury was not convinced of the merits of Mrs. Rorrer's claim. . . . In this regard, Mr. Cooke failed to obtain the consultation advice of an otolaryngologist disassociated with Mrs. Rorrer's case for the purpose of thoroughly reviewing her case for the purpose of arriving at a medical theory of negligence. . . . Thus, it is my opinion that the representation given by Mr. Arthur O. Cooke to Mrs. Mary Carol Rorrer to and through her trial did not comply with the existing standard for the handling of medical malpractice claims in May of 1978 and communities similar to Greensboro, North Carolina.

The foregoing affidavits raise a genuine issue of fact as to whether defendant failed to obtain adequate expert consultation in evaluating plaintiff's claim, whether defendant failed to properly cross-examine expert witnesses and whether he failed to properly investigate, assemble and present relevant evidence at the trial.

In representing plaintiff, defendant was governed by the following standard of care set out in *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954):

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. (Citations omitted.)

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on

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which reasonable doubt may be entertained by well-informed lawyers. (Citations omitted.)

Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. (Citations omitted.)

Id. at 519-520, 80 S.E. 2d at 145-146. The forecast of evidence in the case on appeal clearly raises issues of fact regarding whether defendant complied with this standard of care.

In malpractice actions against attorneys, expert evidence is generally required to establish the attorney's breach of his duty of care. Annot., 14 A.L.R. 4th 170 (1982).

[T]he cases in which courts seem most reluctant to uphold a finding of negligence on the part of an attorney in the absence of expert evidence as to his breach of his duty of care are those in which the alleged negligence involves the attorney's choice of trial tactics, an area generally conceded to involve questions of judgment too fine to be decided by laymen.

Id. at 174. The defendant here provided five affidavits of legal experts who attested that he met the standard of care in *Hodges v. Carter*. In response to these affidavits, plaintiff filed the affidavit of one legal expert. Plaintiff's expert swore: "it is my opinion that the representation given by Mr. Arthur O. Cooke to Mrs. Carol Rorrer to and through her trial did not comply with the existing standard for the handling of medical malpractice claims in May of 1978 and communities similar to Greensboro, North Carolina."

"When a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided . . . , must set forth specific facts showing that there is a genuine issue for trial." G.S. 1A-1, Rule 56(e). Where, as here, defendant offered experts' opinions regarding the negligence issue and plaintiff offered her own expert's opinion in opposition, a question of material fact was raised. The fact that

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defendant filed more supporting affidavits than plaintiff goes only to the issues of credibility and sufficiency of the evidence, two issues which have traditionally been the province of the jury. See *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970), and 1 Brandis on North Carolina Evidence § 8 at 26 (Second Rev. Ed. 1982).

Defendant argues that summary judgment in his favor was proper, because each allegation of negligence in plaintiff's complaint involved no more than an exercise in good faith of defendant's best judgment. In support of this argument defendant gives the earlier cited rule in *Hodges v. Carter, supra* at 520, 80 S.E. 2d at 146:

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

Defendant notes the recent application of this rule in *Quality Inns v. Booth, Fish, Simpson, Harrison and Hall*, 58 N.C. App. 1, 292 S.E. 2d 755 (1982).

In both *Hodges* and *Quality Inns*, the reviewing courts affirmed judgments in favor of the defendant attorneys. The facts in both cases, however, are distinguishable from the facts here. In *Hodges*, the uncontested facts showed that plaintiff failed to produce *any* evidence tending to show a breach of defendant's duty. Moreover, the alleged negligent act of defendant involved conduct which had been the prevailing custom among attorneys in the State for two decades and had been declared valid by a superior court judge.

In *Quality Inns*, the plaintiff filed the affidavit of an attorney in response to defendant attorney's motion for summary judgment. Plaintiff's expert, however, did not make any averments concerning the negligence of the defendant attorney. Furthermore, the legal problem at issue stemmed from an uncertain and unsettled area of the law.

Defendant has failed to realize that the forecast of evidence raises an issue of negligence, which involves more than whether

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defendant exercised his best judgment. In determining this issue, the jury must also consider whether defendant possessed the requisite degree of learning, skill and ability and whether he exercised reasonable and ordinary care and diligence in representing plaintiff. A recent decision by the North Carolina Supreme Court supports our position.

In *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984), the Supreme Court examined the scope of a physician's duty to his patient. This duty is almost identical to an attorney's duty to his client as set out in *Hodges v. Carter*, *supra*. The Court emphasized:

The applicable standard, then, is completely unitary in nature, combining in *one test* the exercise of "best judgment," "reasonable care and diligence" and compliance with the "standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities."

Id. at 193, 311 S.E. 2d at 577.

Defendant also argues that summary judgment in his favor was proper, because plaintiff failed to make any showing of alleged negligence on the part of defendant which proximately caused her injury. He emphasizes that plaintiff had the burden of showing but for defendant's negligence the medical malpractice suit would have been won. The rules governing summary judgment and the evidence before this Court dispute defendant's argument.

When responding to a motion for summary judgment, the nonmovant is not required to make a *prima facie* case for the jury. "He is only required to show that he has evidence to contest such evidentiary matters as the movant may have produced in support of the motion that would, standing alone, defeat the action." *Durham v. Vine*, 40 N.C. App. 564, 568, 253 S.E. 2d 316, 319 (1979).

Plaintiff, in her unverified complaint, alleged defendant's negligence as the proximate cause of the jury verdict against her. Defendant denied this allegation in his unverified answer. In support of defendant's motion for summary judgment, one of the five legal experts swore that "in my opinion there was no act or omis-

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sion on the part of Arthur O. Cooke which was a proximate cause of Mrs. Rorrer not obtaining a jury verdict against Dr. Sardi." In plaintiff's opposing affidavit, her legal expert swore, "It is further my opinion that the departures from these standards of care (for attorneys) contributed greatly to the loss of Mrs. Rorrer's claim when it was tried." Plaintiff has kept the issue of proximate cause alive by responding to the opinion of plaintiff's legal expert with the contradictory opinion of her own legal expert.

It is only when a plaintiff fails to show by competent expert opinion that the defendant attorney's legal tactics and judgments did not meet the required standard of care, that a jury should not pass upon the question of legal malpractice. Here, plaintiff fore-casted some such evidence, and summary judgment in defendant's favor must be reversed.

Reversed and remanded.

Judges HEDRICK and PHILLIPS concur.

WENDY EVE WILLIAMS v. BOYLAN-PEARCE, INCORPORATED

No. 8310SC909

(Filed 3 July 1984)

1. Malicious Prosecution § 11— absence of probable cause—sufficiency of evidence

In a malicious prosecution action instituted after plaintiff employee was acquitted of misdemeanor larceny of two pairs of earrings from defendant employer's store, plaintiff's evidence was sufficient to show an absence of probable cause where it tended to show that plaintiff, through forgetfulness, did wear one pair of defendant's earrings from the store, but that after defendant's agents had concluded their investigation, they could not have harbored a reasonable suspicion that plaintiff had stolen defendant's earrings.

2. Malicious Prosecution § 15— recovery of punitive damages

In order for plaintiff to recover punitive damages in a malicious prosecution action, she must show that she was wrongfully prosecuted from actual malice in the sense of ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of her rights.

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3. Malicious Prosecution § 15—punitive damages—sufficiency of evidence

In a malicious prosecution action instituted after plaintiff employee was acquitted of misdemeanor larceny of two pairs of earrings from defendant employer's store, plaintiff's evidence was sufficient for the jury to find that plaintiff was prosecuted under circumstances which amount to insult, rudeness or oppression and in a manner evincing a reckless and wanton disregard of her rights, and the issue of punitive damages thus should have been submitted to the jury.

4. Costs § 4.1—deposition fees—expert witness fees—refusal to allow as part of costs

The trial court in a malicious prosecution action did not abuse its discretion in refusing to award plaintiff deposition fees and expert witness fees as part of the costs of the action. G.S. 6-18.

Judge JOHNSON concurring in part and dissenting in part.

APPEAL by plaintiff and cross-appeal by defendant from *Bowen, Judge*. Judgment entered 18 March 1983 in WAKE County Superior Court. Heard in the Court of Appeals 11 May 1984.

Plaintiff was employed as a part-time employee of defendant during the 1981 Christmas season. On 5 January 1982 she was the only employee assigned to work in the store's jewelry department. Plaintiff had been told by other employees that employees could model the jewelry. When plaintiff arrived at work on 5 January she took a pair of earrings, owned by defendant, from a display rack and placed them in her ears. She then took the two pairs of earrings which she had worn to work and put them in her purse under the counter. Later in the day plaintiff also put on a bracelet owned by defendant which matched the earrings. Plaintiff wore the jewelry out of the store to lunch. During the afternoon she returned the bracelet to the display case.

During the late afternoon plaintiff was assigned to collect the store's sales records. Once this task was completed, as the store was about to close, plaintiff rushed the fourteen carat gold jewelry down to the safe, locked the display cases and rushed to leave the store because the lights were being turned off. In her haste, plaintiff forgot to sign out, a prerequisite to being paid. She also failed to remove defendant's earrings.

After plaintiff left the store she was seized by J. M. Lynch, an off-duty police officer hired to provide store security, and was taken back into the store. Plaintiff was taken to a small room

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where she was questioned for about an hour by three employees concerning an alleged theft of earrings. While he was questioning plaintiff Lynch told her that she was going to jail for ten years and that if she did not cooperate, things would "go rougher" for her. Plaintiff attempted to return the earrings she had been wearing that day, but Lynch continued to look for other earrings. Part of his efforts consisted of examining the contents of plaintiff's purse without her consent. Lynch later testified that he did not stop plaintiff because she was wearing defendant's earrings out of the store, but because he thought she had taken other earrings earlier when he saw her bend down and do something under the counter. After Lynch discovered only plaintiff's own earrings in her purse, Karen Beasley, the head of defendant's security force, subjected plaintiff to a body search.

During the hour that she was being held in defendant's store for questioning, plaintiff's request to be allowed to call her father several times was refused several times. Her request was finally granted after the search failed to reveal any evidence of stolen earrings.

After holding plaintiff for an hour, Lynch had plaintiff transported to the magistrate's office where he attempted to charge her with felonious larceny. The magistrate would only issue a warrant charging misdemeanor larceny of two pairs of earrings. Plaintiff was found not guilty of these charges in Wake County District Court.

Following her acquittal, plaintiff brought this action for malicious prosecution, seeking both compensatory and punitive damages. At the close of plaintiff's evidence and at the close of all the evidence, defendant moved for a directed verdict. At the close of all the evidence the court denied defendant's motion as to compensatory damages, but refused to submit the issue of punitive damages to the jury. The jury returned a verdict in favor of plaintiff for \$1,000.00 on the issue of compensatory damages. Plaintiff appealed from the court's refusal to submit the issue of punitive damages to the jury and defendant cross-appealed, assigning as error the denial of its motion for a directed verdict and for judgment notwithstanding the verdict.

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Brenton D. Adams for plaintiff.

Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander and James A. Roberts, III, for defendant.

WELLS, Judge.

We first address the question presented by defendant's cross-appeal, i.e., whether the court erred in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict as to plaintiff's claim for compensatory damages. The question raised by defendant's motions is whether the evidence, taken in the light most favorable to the plaintiff, was sufficient to submit the issue to the jury. See *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973) and *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

In order to establish her cause of action for malicious prosecution, plaintiff was required to show (1) that defendant instituted the criminal proceedings against her; (2) that the prosecution was without probable cause; (3) that it was with malice; and (4) that it was terminated in her favor. *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609 (1950); see also *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978). Malice may be inferred from want of probable cause, *Id.* The resolution of the case before us hinges on the issue of probable cause.

In *Smith v. Deaver*, 49 N.C. (4 Jones) 513 (1857), our supreme court defined probable cause as:

[T]he existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty, was guilty. It is a case of apparent guilt as contradistinguished from real guilt. It is not essential, that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time, as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others, as well as his own, to institute a prosecution; not that he knows the facts necessary to ensure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offence.

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The foregoing definition was cited and approved in *Carson v. Doggett*, *supra*. In *Pitts v. Pizza, Inc.*, *supra*, the court stated that probable cause has been properly defined as the existence of such facts and circumstances as would induce a reasonable man to commence a prosecution.

[1] The existence of probable cause is a mixed question of law and fact. *Pitts v. Pizza, Inc.*, *supra*. If the facts are admitted or not in dispute, it is a question of law for the court. *Id.* Conversely, when the facts are in dispute, the question of probable cause is for the jury. *Id.* In the case now before us, the facts were disputed, plaintiff's evidence tending to show that she took no earrings from defendant's stock, but only through forgetfulness, wore one pair out of the store, while defendant's evidence tended to show that Officer Lynch observed plaintiff putting something in her purse while she was working and that plaintiff did wear a pair of defendant's earrings out of the store. Thus, the question was for the jury, and we are persuaded that from the evidence, considered in the light most favorable to plaintiff, that after defendant's agents had concluded their investigation, they could not have harbored a reasonable suspicion that plaintiff had stolen defendant's earrings. Defendant's investigation disclosed no missing earrings nor disclosed that plaintiff had committed any trespass against defendant, an element of larceny. See *State v. Brown*, 56 N.C. App. 228, 287 S.E. 2d 421 (1982); see also *State v. Babb*, 34 N.C. App. 336, 238 S.E. 2d 308 (1977). Defendant's motions for a directed verdict and for judgment N.O.V. were properly denied.

[2, 3] Next we address plaintiff's contention that the court erred in refusing to submit an issue of punitive damages to the jury. In order for plaintiff to recover punitive damages, she must show that she was wrongfully prosecuted from actual malice in the sense of ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of her rights. See *Murray v. Insurance Co.*, 51 N.C. App. 10, 275 S.E. 2d 195 (1981) and cases cited and discussed therein.¹ Compare *Shugar v. Guill*,

1. A corporation is liable for punitive damages for a tort wantonly committed by its agents in the course of their employment. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968).

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304 N.C. 332, 283 S.E. 2d 507 (1981). Plaintiff need only show one of these circumstances in order to recover. She contends that there is evidence from which the jury could have found that she was prosecuted under circumstances of insult, rudeness or oppression and evidence from which a jury could have found that she was prosecuted in a manner which evidenced a reckless and wanton disregard for her rights.

In jury trials the usual rules governing motions for a directed verdict apply when there is such a motion as to a claim for punitive damages on the grounds of insufficiency of evidence, and the trial judge must determine as a matter of law whether the evidence when considered in the light most favorable to the plaintiff is sufficient to carry the issue of punitive damages to the jury.

Shugar v. Guill, supra. The evidence in this case so viewed clearly reveals support for plaintiff's claim that she was prosecuted under circumstances which amount to insult, rudeness or oppression. While a polite, but firm, investigation may have served the better interest of both plaintiff and defendant, the conduct of defendant's employees in this case was such that a jury could find that plaintiff was treated rudely and oppressively.

There was also evidence from which the jury could find that plaintiff was prosecuted in a manner evincing a reckless and wanton disregard of her rights. The employee who had plaintiff arrested testified that he did not try to prove her innocence because "I try to prove someone's guilt routinely." While he was vigorously trying to prove plaintiff's guilt he failed to take an inventory of the jewelry department to see if there were any items missing, did not check plaintiff's sales book to determine if she had sold any jewelry, did not check with anyone regarding plaintiff's personnel record or her character. These are all admissions which could be found to evidence a reckless and wanton disregard of plaintiff's right to be free from malicious prosecution. We hold that for the reasons stated above the court erred in refusing to submit an issue of punitive damages to the jury. We therefore reverse the court's judgment as to this question.

In a case such as this, where the question of granting a directed verdict is a close one, we feel it appropriate to emphasize the procedural point that,

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[T]he better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial. . . .

(Citations omitted.) *Manganello v. PermaStone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

[4] Finally, plaintiff argues the court erred in refusing to award her the costs of depositions and expert witness fees. N.C. Gen. Stat. § 6-18 (1981) provides that costs are to be allowed in malicious prosecution actions. The question we must decide is whether deposition fees and expert witness fees are costs within the purview of the statute. In *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 296 S.E. 2d 512 (1982) this court said a trial court in its discretion may tax deposition costs as part of the "costs" of an action. In this action the court in its discretion refused to award deposition expense. We are unable to find any abuse of discretion and therefore affirm the court's order. N.C. Gen. Stat. § 7A-314(d) (1981) provides that the court in its discretion may award expert witness fees. These fees may be awarded only if the witness' testimony was material and competent. *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972). The court in this case exercised its discretion in failing to award such fees. We find no abuse of discretion and therefore uphold the court's ruling.

The judgment of the court is affirmed in part and reversed in part and the matter is remanded for a new trial as to the issue of punitive damages.

As to plaintiff's appeal, affirmed in part and reversed in part and remanded for a new trial as to the issue of punitive damages.

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As to defendant's cross-appeal, affirmed.

Judge BECTON concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON concurring in part and dissenting in part.

I concur in the majority's holding that (1) the trial court correctly denied defendant's motions for a directed verdict and for judgment n.o.v. and (2) that the trial court did not abuse its discretion in refusing to award plaintiff costs of depositions and expert witness fees. However, I dissent from the majority's holding that the trial court erred in failing to submit an issue of punitive damages to the jury.

Plaintiff concedes that there is no evidence of "actual malice," in the sense of personal ill-will, spite, or desire for revenge. However, plaintiff offers two theories in support of her claim for punitive damages: (1) plaintiff was wrongfully prosecuted in a manner evincing a reckless and wanton disregard of plaintiff's rights and (2) plaintiff was wrongfully prosecuted under circumstances of insult, rudeness or oppression. Plaintiff seeks punitive damages based upon the conduct of four of defendant's employees: J. M. Lynch, a police officer of the city of Raleigh hired by defendant to handle its security problems; Karen Beasley, also hired by defendant in the capacity of a security officer; Blair Wall, defendant's personnel manager; and Earl Barnes, defendant's store manager. In an effort to demonstrate that defendant's employees acted with actual malice, plaintiff relies upon the following circumstances: (1) Officer Lynch's failure to immediately confront plaintiff about his suspicion of plaintiff prior to arresting her and Lynch's testimony that he routinely tries to prove one's guilt, (2) Officers Lynch and Beasley's search of plaintiff's person and pocketbook, (3) statements Officer Lynch made to plaintiff while interrogating her, (4) Wall's failure to "get involved" and obtain additional information about the facts surrounding plaintiff's arrest, (5) Barnes' failure to talk to plaintiff's family and friends, and (6) the refusal of Officer Lynch to allow plaintiff to be transported by her father to the magistrate's office.

The undisputed evidence shows that Wall did not "get involved" because it was a security problem being handled by de-

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fendant's security personnel, in whom Wall had confidence. Barnes was reluctant to talk with plaintiff's family and friends because of his confidence in the security personnel and the fact that he was out of town when plaintiff was arrested. After observing plaintiff's activities in the jewelry department on the morning of January 5, 1982, Officer Lynch continued to observe plaintiff's activities "to either corroborate (his) suspicions, or just to get the whole story that was going on that day." Plaintiff was under arrest at the time a search of her person and pocketbook were made and the scope and manner in which the searches were conducted were reasonable. In transporting plaintiff in a police vehicle, Officer Lynch was following the guidelines of the Raleigh Police Department. It appears that plaintiff has taken Officer Lynch's statement about his efforts to prove individuals guilty out of context. The full context in which the statement was made is as follows: On cross-examination Officer Lynch was asked, "And you weren't interested in determining her (plaintiff) innocence, were you?" Officer Lynch answered, "Well, I don't know exactly how I can answer that. As a police officer, I have to deal with the elements of a crime and gathering information. I don't go trying to prove someone's innocence, as much (as) I try to prove someone's guilt routinely." Clearly, when read in full context, the statement does not rise to the level of malice. None of the evidence of record is sufficient to support a claim for punitive damages and the court properly refused to submit a punitive damage issue.

PRISCILLA MURPHY v. LEDELL S. MCINTYRE

No. 834SC626

(Filed 3 July 1984)

1. Schools § 13.2— dismissal of teacher's aide—failure to exhaust administrative remedies

Where the action complained of by plaintiff teacher's aide was defendant school principal's evaluation of her that influenced the county school board not to rehire her, plaintiff's liberty interest in seeking and obtaining further employment was protected by the administrative remedy provided in G.S. 115-34, and plaintiff's action must be dismissed where she failed to exhaust her administrative remedies provided by that statute.

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2. Contracts § 32— malicious interference with contract—malice in legal sense

In order to establish a prima facie case of malicious interference with contract, a plaintiff must establish that the defendant's actions were malicious in the legal sense, and proof of actual malice is not sufficient.

3. Contracts § 31— malicious interference with contract—defendant need not be outsider

One need not be an outsider in order to be held liable for malicious interference with contract.

4. Contracts § 34; Schools § 13.2— dismissal of teacher's aide—malicious interference with contract by principal—insufficient evidence

The evidence of plaintiff teacher's aide was insufficient to establish malice on the part of defendant school principal so as to make out a prima facie case of malicious interference with contract where it tended to show that defendant lowered plaintiff's performance evaluation without consulting or informing the teacher who had co-signed the evaluation form; the lowered evaluation resulted in plaintiff not being rehired for the following year; a principal was not required to consult the supervising teacher before changing a particular aide's evaluation; and defendant thus acted within the scope of his authority in lowering the evaluation of plaintiff's performance.

APPEAL by plaintiff from *Reid, Judge*. Judgment entered 11 January 1983 in Superior Court, DUPLIN County. Heard in the Court of Appeals 6 April 1984.

This is a civil action wherein plaintiff seeks compensatory and punitive damages from defendant for libel and slander and malicious interference with contract. Plaintiff also seeks equitable relief in the form of reinstatement to her job.

The essential facts here are not in dispute. Plaintiff was employed as a teacher's aide at Bland Elementary School in the Sampson County School System. She held that position for the 1979-80 and 1980-81 academic years. Defendant was the principal at Bland School. In February of 1981, plaintiff informed defendant that she would be unable to work for the remainder of the school year because of a need to care for her mother, who was seriously ill. At the suggestion of defendant, plaintiff requested and received a leave of absence from her job rather than resigning it. The leave of absence was suggested because it might improve plaintiff's chances for employment for the next school year.

Due to funding cutbacks and some curriculum changes, the Sampson County School System was forced to eliminate some positions, including teacher's aides. Teacher's aides were hired on a

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yearly basis and the personnel cutbacks meant that some contracts would not be renewed for the 1981-82 school year.

In order to determine which aides to rehire for the 1981-82 school year, the Sampson County School System instituted a policy in May of 1981 whereby teacher's aides would be evaluated and the decision to rehire would be made on the basis of the evaluation. The aides were to be evaluated in the general areas of seniority, performance, and educational level. The evaluation was performed by filling out a form and providing specific information, much of it objective, about each teacher's aide: i.e., level of education, years employed, etc. Under the general area of performance, the following criteria were listed: "Arrives at work on time," "Attendance," "Follows directions," "Completes Assigned Task," "Rapport with teachers," "Rapport with students," and "Creativity." Each aide was to be ranked on each criterion. A ranking of "0" signified a poor rating, "1" was satisfactory, and "2" was excellent. The maximum score possible in the area of performance was 14. Each evaluation form contained a space for the signature of the principal and for the signature of the teacher to whom the aide was assigned during the school year.

On or about 1 June 1981, defendant and Ms. Betty Sykes, the teacher under whose supervision plaintiff had worked during the 1980-81 school year, completed the performance evaluation for plaintiff. After discussion with defendant, Ms. Sykes ranked plaintiff at "2," or excellent, in every category but attendance, where plaintiff received a ranking of "1". Plaintiff received a score of 13 out of 14 possible points. Ms. Sykes then signed the evaluation form.

After the evaluations had been turned in by the school principals, the Sampson County Board of Education made its decision as to how many aides to hire for the 1981-82 school year. Those aides who received a score of 18 or more points on the entire evaluation—combining the point totals for all of the general areas—were rehired. Plaintiff's point total for the entire evaluation was 17 and she was not rehired. Plaintiff asked the school superintendent of Sampson County why she was not rehired and was shown her evaluation form. In the performance section, plaintiff had received a rank of "0" on the "Follows directions" criterion, "1" on "Attendance" and "Rapport with teachers," and

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"2" on the other items. After talking with Ms. Sykes in September 1981, plaintiff learned that rankings in the performance section of the evaluation had been changed since Ms. Sykes had signed the form.

On 12 November 1981, plaintiff filed this action alleging basically that the information on the evaluation form was false, that defendant had deliberately and maliciously misrepresented plaintiff's performance as a teacher's aide, and that he had acted in bad faith and with the intention of preventing plaintiff from being rehired for the 1981-82 school year. Plaintiff claimed that defendant's actions constituted libel and slander and malicious interference with contract and sought actual and punitive damages. Plaintiff also claimed that defendant's actions violated her constitutional due process rights and, under 42 U.S.C. § 1983, sought damages for mental anguish allegedly resulting from that violation.

Defendant answered, denying all of the material allegations in the complaint and specifically denying, *inter alia*, that plaintiff was entitled to any administrative remedy by defendant. Defendant asserted administrative privilege, official immunity and lack of jurisdiction as affirmative defenses. Defendant also asserted that plaintiff had no property or liberty interest in her job and could not claim a violation of her constitutional rights. Plaintiff responded, conceding that the court had no equitable jurisdiction in the case and that she possessed no property right in her job.

On 9 September 1982, defendant moved for summary judgment. Defendant's motion was granted as to the alleged constitutional violations but denied as to the claims of malicious interference with contract and libel and slander.

The matter came on for trial on 10 January 1983. At the close of plaintiff's evidence on 11 January 1983, defendant moved for a directed verdict. The motion was granted and plaintiff's remaining claims were dismissed. Plaintiff appealed.

Thompson and Ludlum, by E. C. Thompson, III, for plaintiff appellant.

Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, by James C. Fuller, Jr., for defendant appellee.

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EAGLES, Judge.

I

[1] Plaintiff first assigns as error the trial court's entry of summary judgment for defendant with respect to plaintiff's claims that defendant had violated her constitutional rights to due process under the fifth and fourteenth amendments. Plaintiff concedes that she had no property right in her job but contends that she has a liberty interest in seeking and obtaining future employment. Plaintiff contends that she was deprived of this liberty interest in violation of her constitutional rights when the School Board decided not to rehire her without affording her an opportunity to contest her evaluation, the sole basis of the Board's decision.

We disagree. This issue was considered in *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). *Presnell* involved the dismissal of a public school employee by the principal on the basis of allegedly unsubstantiated statements. There, our Supreme Court held that, while there was no property right to the job, plaintiff did have a liberty interest in seeking and obtaining future employment. The Court held that that liberty interest was adequately protected by the administrative remedy prescribed in G.S. 115-34.

We note that G.S. 115-34 was repealed effective 1 July 1981 and replaced by G.S. 115C-45(c). Because plaintiff's right, if any, to an administrative remedy arose on 24 June 1981, 6 days before the effective date of the new statute, we assume without deciding that G.S. 115-34 applies to this case. We note also that G.S. 115C-45(c) does not vary materially from G.S. 115-34.

G.S. 115-34 provides for a two-step appeal process as follows:

An appeal shall lie from the decision of all school personnel to the appropriate county or city board of education.

. . .

An appeal shall lie from the decision of a county or city board of education to the superior court of the State in any action of a county or city board of education affecting one's character or right to teach.

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Plaintiff argues that the present case is distinguishable from *Presnell v. Pell* in that the decision not to rehire plaintiff was made by the School Board while the employee in *Presnell* was discharged by the principal. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971) holds that G.S. 115-34 has no application where the decision complained of is the decision of a county board of education. With this in mind, plaintiff argues that *Presnell v. Pell* does not control and that the administrative remedy of G.S. 115-34 does not protect her liberty interest.

Plaintiff's argument, while accurately distinguishing *Presnell*, overlooks the fact that the action complained of is not the School Board's decision not to rehire her, but the principal's evaluation of her that influenced the School Board's decision. We hold that *Presnell v. Pell* does control here; plaintiff's constitutional claim was properly dismissed for failure to exhaust her administrative remedies. See *Snuggs v. Stanly Co. Dept. of Public Health*, 310 N.C. 739, 314 S.E. 2d 528 (1984) (plaintiff's claim under 42 U.S.C. § 1983 properly dismissed under G.S. 1A-1, Rule 12(b)(6) for failure to alleged lack of adequate State administrative remedies).

II

Plaintiff next contends that it was error for the trial court to allow defendant's motion for a directed verdict at the close of plaintiff's evidence. Plaintiff argues that, viewed as required, her evidence is sufficient to establish a *prima facie* case of malicious interference with contract. Plaintiff argues that the evidence shows that defendant's actions were wrongful and that they were taken with the intent of adversely affecting her chances for employment in the Sampson County School System for the 1981-82 school year. Plaintiff submits that this evidence establishes the element of malice necessary for a *prima facie* case of malicious interference with contract and to withstand defendant's motion for directed verdict. We disagree.

[2, 3] In order to establish a *prima facie* case of malicious interference with contract, a plaintiff must establish that the defendant's actions were malicious in the legal sense. Here, malice means intentionally doing a wrongful act or exceeding one's legal right or authority in order to prevent the making of a contract between two parties. The action must be taken with the design of injuring one of the parties to the contract or of gaining some ad-

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vantage at the expense of a party. *Johnson v. Gray*, 263 N.C. 507, 139 S.E. 2d 551 (1965); *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954); *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E. 2d 647 (1945). Plaintiff's evidence must show that defendant had no legal justification for his action; proof of actual malice is not sufficient. *Childress v. Abeles*, *supra*.

Indeed, actual malice and freedom from liability for this tort may coexist. If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability for so doing, no matter how malicious in actuality his conduct may be. A "malicious motive makes a bad act worse but it cannot make that wrong which, in its own essence, is lawful."

Id. at 675, 84 S.E. 2d at 182, quoting *Bruton v. Smith*, 225 N.C. 584 at 586, 36 S.E. 2d 9 at 10 (1945). Recent cases hold that one need not be an outsider in order to be held liable for malicious interference with contract. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976).

[4] Viewing the evidence in the light most favorable to the plaintiff, *see, e.g., Cook v. Export Leaf Tobacco Co.*, 50 N.C. App. 89, 272 S.E. 2d 883, *rev. denied*, 302 N.C. 396, 279 S.E. 2d 350 (1981); *Hart v. Warren*, 46 N.C. App. 672, 266 S.E. 2d 53, *rev. denied*, 301 N.C. 89, --- S.E. 2d --- (1980), there can be no doubt that defendant McIntyre lowered plaintiff's performance evaluation without consulting or informing Ms. Sykes, the teacher who had co-signed the form. It is likewise undisputed that the lowered evaluation resulted in plaintiff not being rehired for the 1981-82 school year. The trial court aptly characterized defendant's actions as "reprehensible," "underhanded," "below the board," and "not fair to the parties."

However, there is no evidence that defendant acted maliciously in the legal sense. The school superintendent, plaintiff's witness, testified on direct and cross-examination that, although consultation with the supervising teacher was expected and encouraged, the final responsibility for the evaluation rested with the principal. He further testified that, while the policy regarding the evaluations was not clearly spelled out, a principal was not required to consult the supervising teacher before changing a particular aide's evaluation. The superintendent testified on cross-examination that Mr. McIntyre had not "done anything wrong"

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and had in fact complied with the policy of involving teachers in the evaluations.

The record does not disclose defendant's motives. However, his actions were within the scope of his authority and, for that reason, were not legally malicious. In view of defendant's position as principal, plaintiff's evidence permits the inference that defendant had the responsibility and, indeed, the obligation to act as he did, even though another person might have acted differently. *Dawson v. Radewicz*, 63 N.C. App. 731, 306 S.E. 2d 171 (1983).

Plaintiff's evidence fails to establish malice on the part of defendant sufficiently to make out a *prima facie* case of malicious interference with contract. The trial court properly granted defendant's motion for directed verdict with respect to this claim. Plaintiff's argument to the contrary is without merit.

III

Although the trial court ruled that plaintiff had pleaded her claims of libel and slander sufficiently to withstand defendant's motion for summary judgment, plaintiff on appeal does not contest the directed verdict for defendant with respect to those claims. Plaintiff has apparently abandoned her exceptions and assignments of error insofar as they relate to the libel and slander issues and we will not consider them here. We hold that the trial court's grant of defendant's motion for directed verdict was proper in all respects and that plaintiff's action was properly dismissed.

For the reasons stated above, the judgment of the trial court is

Affirmed.

Judges WEBB and JOHNSON concur.

Gray v. Hager

LEON H. GRAY AND WIFE, MARILYN W. GRAY, PLAINTIFFS v. EUGENE B. HAGER AND WIFE, LOU B. HAGER, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. UNITED FARM AGENCY, INC., THIRD PARTY DEFENDANT

No. 8322DC462

(Filed 3 July 1984)

Contracts § 3—“agreement” for sale and purchase of house—indefiniteness of agreement

A proposed contract for the sale of a home was incomplete and unenforceable because it lacked essential terms which were beyond the court's capacity to supply by implication and as to which the parties had not agreed upon a mode of settlement. Although the document specified a sale price, it stated that the terms of payment would be agreed upon subsequently; therefore, the minds of the parties had not met on a “portion of the proposed terms.”

APPEAL by original defendants from *Fuller, Judge*. Judgment entered 1 February 1983 in District Court, IREDELL County. Heard in the Court of Appeals 12 March 1984.

Original defendants (hereafter defendants) appeal from allowance of plaintiffs' motion for summary judgment, and denial of their motion for same, in an action for breach of an “agreement” for the sale and purchase of plaintiffs' house.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for plaintiff appellees.

Raymer, Lewis, Eisele, Patterson & Ashburn, by Douglas G. Eisele, for defendant appellants.

WHICHARD, Judge.

I.

The issue is whether a document that specifies a sales price, but states that an interest-bearing note and deed of trust will be executed, and that the terms of payment will be agreed on subsequently, meets the legal requisites of a valid contract. We hold that it does not, and that the court thus erred in granting summary judgment to plaintiffs and denying it to defendants.

II.

Plaintiffs and defendants signed a document captioned “deposit receipt and agreement of sale,” which provided that defend-

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ants would purchase plaintiffs' house for \$48,500. Defendants were to make a down payment of \$300, to pay \$9,400 on or before 1 May 1981, and to pay the balance as follows (quoting from the document):

Terms of payment and rate of interest: 12% interest length of time to be negotiated [sic] by seller and buyer.

And the buyer agrees to pay the balance as follows:

1. Note and deed of trust for \$38,800.00.
2. Interest rate to be 12%.
3. Length of time to be agreed on by buyer and seller due to buyers house being on the market for sale and the amount of money to be paid on this purchase and the length of time to sell buyer's present home.

The document also provided that "if either seller or buyer fails to perform his part of this agreement, he shall forthwith pay to the other party hereto a sum equal to 10 per cent of the agreed price of sale as consideration for the execution of this agreement by such other party."

Defendants neither deposited the \$9,400 by 1 May 1981 nor proceeded with the purchase. Plaintiffs commenced this action seeking specific performance or, alternatively, damages for breach as provided in the document. Defendants, in their "motions to dismiss, answer and counterclaim," moved to dismiss the complaint under G.S. 1A-1, Rule 12(b)(6). They contended, *inter alia*, that the document was not a valid contract because it did not contain the terms and time of payment of the balance of the purchase price. Judge Lester Martin denied the motion.

Plaintiffs subsequently sold the house for \$48,500. They then filed a Notice of Election, abandoning their claim for specific performance and electing to proceed solely on the claim for damages.

Defendants moved for summary judgment. Plaintiffs also moved for summary judgment, seeking to recover \$4,550 (ten per cent of the sales price as provided in the document, less the \$300 previously paid). The court denied defendants' motion and granted plaintiffs'.

Defendants appeal.

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III.

When considering a motion for summary judgment,

the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. . . . The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. . . . This burden may be carried by a movant by proving that an essential element of the opposing party's claim is nonexistent The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by . . . allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.

Gregory v. Perdue, Inc., 47 N.C. App. 655, 656-57, 267 S.E. 2d 584, 586 (1980). Defendants contend that the "fatal weakness" in plaintiffs' claim is that while the document specifies the sales price, it states that the terms of payment will be agreed on subsequently. They argue that such a document fails to meet the legal requisites of a valid contract.

It is a basic principle of contract law that:

One of the essential elements of every contract is mutually [sic] of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If *any portion* of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.

Croom v. Lumber Co., 182 N.C. 217, 220, 108 S.E. 735, 737 (1921) (emphasis supplied); *see also Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E. 2d 692, 695 (1974); *Gregory v. Perdue, Inc.*, *supra*, 47 N.C. App. at 657, 267 S.E. 2d at 586. "The courts generally hold [that] a contract, or offer to contract, leaving material portions open for future agreement [.] is nugatory and void for indefiniteness.' . . . This does not mean, however, that the courts will not supply an essential term by implication under appropriate cir-

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cumstances." *Kidd v. Early*, 289 N.C. 343, 357-58, 222 S.E. 2d 392, 402-03 (1976) (quoting *Boyce v. McMahan, supra*).

In *Kidd* our Supreme Court held that "when an option to purchase real estate neither specifies the method of payment nor provides that terms are to be fixed by a later agreement, the law implies that the purchase price will be paid in cash." *Kidd, supra*, 289 N.C. at 359, 222 S.E. 2d at 404. The document here clearly provided that certain terms were to be fixed by later agreement; there thus can be no implication that the purchase price was to be paid in cash. The document also provided for execution of an interest-bearing note and deed of trust. This evidences a clear intent to enter a credit rather than a cash transaction.

Credit transactions do not lend themselves to the supplying of essential terms by the courts by implication. They can be shaped in an extensive variety of forms. When their terms remain unsettled, the courts have no basis for assuming that the parties intended to choose one of those forms over a multiplicity of potential others. Absent details of the credit arrangement, a court has no means by which to determine precisely what action prospective creditors seek to have prospective debtors take. There thus is no basis on which to order specific performance. There equally is no basis for finding a breach, because the prospective debtors have not failed to do what the document required of them.

"In several cases involving attempts to recover damages for the breach of a contract for the sale of realty, relief has been denied on the ground that no actual contract ever came into being because terms of payment were left to future negotiation." Annot., 68 A.L.R. 2d 1221, 1228 (1959). We believe that result must obtain here. The plaintiffs' affidavit in support of their motion for summary judgment states that "the agreement was sufficient for the parties to complete the transaction if the defendants would have made an effort in good faith to complete the agreement." The moving parties' own forecast of evidence thus acknowledged the incompleteness of the "agreement." The minds of the parties had not met on a "portion of the proposed terms," *Croom, supra*; rather, the parties simply had agreed to agree upon terms in the future. See *Burgess v. Rodom*, 121 Cal. App. 2d 71, 262 P. 2d 335 (1953). The document established "no mode . . . by which [the unsettled terms could] be settled." *Croom, supra*. There thus was no agreement. *Kidd, supra*; *Croom, supra*.

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IV.

We hold that the proposed contract was incomplete and unenforceable because it lacked essential terms which were beyond the court's capacity to supply by implication, and as to which the parties had not agreed upon a mode of settlement. The court thus erred in entering summary judgment for plaintiffs and denying it to defendants.

The judgment is therefore reversed, and the cause is remanded for entry of a judgment denying plaintiffs' motion for summary judgment and allowing defendants'.

Reversed and remanded.

Chief Judge VAUGHN and Judge PHILLIPS concur.

DUKE POWER COMPANY v. CITY OF HIGH POINT, ET AL.

No. 8318SC775

(Filed 3 July 1984)

1. Electricity § 2.3— city's extension of electric lines—service of city facilities

The first sentence of G.S. 160A-312 granted a city the absolute authority, without limitation or restriction, to extend electric service to its city-owned facilities outside the city limits. The second sentence of G.S. 160A-312 providing that a city proposed extension of electric service must be "within reasonable limitations" has no application where the city proposes to extend service in order to serve itself.

2. Injunctions § 2.1— failure to show irreparable injury

The trial court erred in enjoining a city from serving private customers by electric lines extended to city facilities outside the city limits where there was no evidence that the city presently intends to serve private customers with such lines, since there was no showing of a real and immediate irreparable injury.

APPEAL by plaintiff and defendant from *Hobgood, Hamilton, Judge*. Judgment entered 24 February 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 May 1984.

Duke Power Company (Duke) appeals from an order authorizing the City of High Point (the City) to extend electric lines out-

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side city limits in order to serve a pollution control plant, a police academy, and a garbage pulverizer plant, all owned and operated by the City. Prior to this action, Duke had been providing electric service to all three city facilities, located just east of the city limits.

The City appeals from that part of the order enjoining it from serving private customers outside city limits, using its newly constructed east side electric lines.

We interpret in this opinion G.S. 160A-312 as it affects a City's right to extend electric service outside its corporate limits. For reasons herein set forth, we affirm that part of the order authorizing the City to serve its own facilities and vacate that part of the order enjoining the City from serving other potential customers.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts, W. Winburne King, III, and Thomas W. Brawner, for plaintiff.

Spruill, Lane, Carlton, McCotter & Jolly, by John R. Jolly, Jr., Ernie K. Murray, and J. Phil Carlton, for defendant.

VAUGHN, Chief Judge.

I.

[1] G.S. 160A-312 has been established as the sole legislative authority for and only restriction upon municipalities furnishing electric service outside their corporate limits. *See State ex rel. Utilities Comm. v. Virginia Elec. and Power Co.*, 310 N.C. 302, 311 S.E. 2d 586 (1984); *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E. 2d 209 (1983); *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974).

The first sentence of G.S. 160A-312 provides: "A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens." We interpret this sentence as granting the City absolute authority, without limitation or restriction, to extend electric service to its city-owned facilities in this case.

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The second sentence of G.S. 160A-312 grants a city limited, rather than absolute authority to extend electric service to private customers outside city limits. Pursuant to the second sentence of G.S. 160A-312, a city proposed extension of electric service must be "within reasonable limitations." It is this basis of authority that we relied on in the companion case, filed simultaneously herewith, authorizing the City to extend electric service in order to provide street lights outside city limits. *Duke Power v. City of High Point #2* (filed 3 July 1984).

The second sentence of G.S. 160A-312 has no application here, where the City proposes to extend service in order to serve itself. Duke's argument, therefore, that the City's extension would exceed reasonable limitations is without merit.

In light of the City's absolute right to serve itself, we affirm the trial court order authorizing the extension of east side electric lines by the City.

II.

[2] It is well-established that an injunction will be granted only when irreparable injury is both real and immediate. *See Membership Corp. v. Light Co.*, 256 N.C. 56, 122 S.E. 2d 761 (1961). Injunctive relief is premised on an injury actually threatened and practically certain, not one anticipated and merely probable. *Hooks v. Speedways, Inc.*, 263 N.C. 686, 140 S.E. 2d 387 (1965).

Duke has not shown that the prospective loss of potential customers outside city limits was an injury warranting injunctive relief. In Finding of Fact Number 25, the trial court found:

While it is not uncommon for cities maintaining their own electric distribution systems to serve power customers outside their corporate limits, no evidence was presented at trial tending to indicate that the City presently is considering serving any specific electric customers other than itself, and no evidence was presented tending to indicate that the City presently intends to acquire new customers along the line extensions to the East Side Plant.

Since a judgment should adjudicate the basic legal rights of the parties in view of present and not anticipated facts, *Membership Corp. v. Light Co.*, *supra*, we vacate that portion of the judg-

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ment enjoining the City from serving customers from its east side electric lines, other than city-owned facilities and public enterprises. We note, however, that the City's future rights if it desires to serve private customers outside the City from its east side electric lines will be governed by the reasonable limitation standard contained in the second sentence of G.S. 160A-312.

Affirmed in part.

Vacated in part.

Judges BRASWELL and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JULY 1984

BREWER v. MOORE No. 8324SC1332	Beaufort (82CVS243)	Reversed
CLINARD v. BROYHILL, INC. No. 8321DC1280	Forsyth (83CVD2770)	Affirmed
DAVIS v. N.C. MUTUAL LIFE INS. CO. No. 836DC1128	Hertford (83CVD141)	Vacated
HEATH v. RELIANCE INS. CO. No. 834SC681	Sampson (82CVS611)	Affirmed
INGRAM v. BARRINO No. 8318DC988	Guilford (81CVD879)	Vacated & Remanded
JERNIGAN v. JERNIGAN No. 8316DC521	Scotland (81CVD167)	Affirmed
JORDAN v. JONES No. 8325SC1219	Burke (81CVS1313) (82CVS20) (82CVS940)	Affirmed
MOORE v. BEACON INS. CO. No. 8326DC925	Mecklenburg (79CVD7431)	No Error
NELSON, et al. v. MONTGOMERY, et al. No. 8330SC713	Cherokee (81SP79)	Affirmed
PRATT v. PRATT No. 8310DC1232	Wake (83CVD3580)	Affirmed
STATE v. BEAN No. 838SC1146	Wayne (83CRS4803) (83CRS4804)	No Error
STATE v. BEAVERS No. 8315SC858	Chatham (82CRS4338) (82CRS4929)	Appeal Dismissed
STATE v. CHAMBERS No. 8315SC1264	Alamance (82CRS14368)	No Error
STATE v. CLARK No. 8315SC1208	Alamance (82CRS19221)	No Error
STATE v. CRAWFORD No. 8321SC1275	Forsyth (83CRS25435)	No Error

STATE v. FRANCIS No. 834SC1156	Sampson (82CRS8936) (82CRS8937) (82CRS8938)	Affirmed
STATE v. HARRIS No. 832SC1040	Beaufort (82CRS2868)	No Error
STATE v. McLELLAN No. 8313SC1117	Bladen (81CRS3532)	No Error
STATE v. MEDLIN No. 8320SC1093	Union (82CRS3620)	Affirmed
TRI-CITIES DOOR v. GALLONI No. 8318SC987	Guilford (83CVS3731)	Affirmed
WYCOUGH v. FLYNT KNIT CORP. No. 8310IC1170	Industrial Commission (I-0826)	Appeal Dismissed

Bowles Distributing Co. v. Pabst Brewing Co.

STAN D. BOWLES DISTRIBUTING COMPANY v. PABST BREWING COMPANY AND PABST BREWING COMPANY, D/B/A BLITZ-WEINHARD COMPANY AND JEFFREYS BEER AND WINE COMPANY

No. 838SC428

(Filed 3 July 1984)

1. Contracts § 12.1— amendment of beer distributorship agreement—no expansion of products

An amendment of a beer distributorship agreement giving plaintiff distributor the right to sell and distribute "Pabst beer products" in any area did not expand the products available to plaintiff under the original agreement granting plaintiff the right to distribute "Pabst beer and ale."

2. Contracts § 12.1— distributorship agreement—beer and ale—inclusion of malt liquor

A distributorship agreement granting plaintiff the right to sell and distribute "Pabst beer and ale" included malt liquor, and defendant brewer was obligated under the agreement to sell plaintiff Olde English 800 Malt Liquor.

3. Corporations § 1— breach of distributorship agreement—decision allegedly made by subsidiary

The corporate defendant could not avoid liability for its breach of a distributorship agreement by failing to sell a malt liquor product to plaintiff beer distributor on the ground that a wholly-owned subsidiary had full responsibility for all marketing decisions with respect to the malt liquor where defendant manufactured and sold the malt liquor while the subsidiary served merely as a marketing division, and plaintiff previously conducted all its negotiations with defendant and had entered into the distributorship agreement with defendant.

4. Customs and Usages § 1— erroneous finding based on custom in industry—court's decision not affected

Although the trial court erred in finding that under industry customs and practices plaintiff beer distributor had the right to expect its franchise rights to be exclusive and that defendant brewer violated those rights by selling a malt liquor product to another distributor for the same territory where an amendment to the distributorship agreement gave defendant brewer the right to sell its products to any person in any area, such findings did not affect the trial court's determination that defendant brewer breached the distributorship agreement by refusing to sell a malt liquor product to plaintiff.

5. Damages § 3.6— agreement limiting consequential damages

Parties may limit contractually or exclude consequential damages unless the limitation or exclusion is unconscionable.

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6. Damages § 3.6— exclusion of consequential damages—listing by parties

When the parties specifically list the types of consequential damages to be excluded, only those consequential damages are excluded.

7. Contracts § 27.3; Damages § 3.5— breach of distributorship contract—agreement excluding loss of profits—entitlement to diminution in value of franchise

Where a beer distributorship agreement provided that defendant brewer would not be liable "for any loss of profits by distributor or for any part of distributor's sales promotion, organization, business investment, operating or other expenses," plaintiff distributor was not entitled to recover for loss of profits for defendant's breach of the distributorship agreement but was entitled to recover damages for the diminution in value of the franchise.

8. Contracts § 27.3— breach of distributorship agreement—damages for diminution in value of franchise

In an action for defendant brewer's breach of a beer distributorship agreement by refusing to sell a malt liquor product to plaintiff distributor, defendant was liable only for diminution in value of the distributor's franchise resulting from plaintiff's inability to sell the malt liquor product made by defendant and was not liable for any diminution in value attributable to agreements plaintiff had with other companies.

9. Contracts § 27.3— breach of contract—punitive damages not justified

The trial court erred in awarding punitive damages for breach of contract where the evidence was indicative of a good faith dispute over interpretation of the contract and did not establish aggravated tortious conduct as well.

APPEAL by defendant Pabst Brewing Co. from *Lane, Judge*. Judgment entered 12 October 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 March 1984.

Defendant Pabst appeals from a judgment finding that it breached its contract with plaintiff and awarding compensatory and punitive damages.

Brown, Fox and Deaver, by Bobby G. Deaver, and George R. Kornegay, Jr., P.A., by Janice S. Head and George R. Kornegay, Jr., for plaintiff appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Martha Jones Mason, for defendant Pabst Brewing Co., appellant.

WHICHARD, Judge.

I.

The facts giving rise to this action are that plaintiff and defendant Pabst entered into a written distributorship agreement

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on 23 January 1975. Plaintiff was a wholesale distributor for alcoholic malt beverage products. Defendant Pabst was a national brewer "engaged in the manufacture and sale of Pabst beer and Pabst ale." The agreement granted plaintiff the right to sell "Pabst beer and ale" in the counties of Wilson, Greene, Wayne, and Lenoir. The agreement also provided that "[n]otwithstanding the use hereinafter of the words 'beer and ale' and 'beer or ale,' or the use of the word 'Pabst,' this agreement shall apply to and cover only the product or products expressly first named above in this paragraph 1." The parties agreed that the agreement would be "governed by and interpreted in accordance with the laws of the State of Illinois."

On 24 January 1975 plaintiff and defendant Pabst entered into an amendment to the distributorship agreement. Paragraph four of the amendment provided that

[a]ny provisions in the distributorship agreements with the distributor which limit or restrict the sale and distribution of any Pabst beer products by the distributor to a particular geographical area or territory or to any type or class of customer are hereby modified to provide that such geographical area or territory shall hereafter constitute the distributor's area of primary marketing responsibility, and hereafter Pabst and the distributor shall have the right to sell and distribute Pabst beer products in any place or area that, and to any person to whom, Pabst or the distributor may be lawfully authorized so to do.

The above amendment was added to every Pabst distributor's contract regardless of what products the distributor was authorized to sell under the contract.

In March 1979 defendant Pabst entered into an "Asset Purchase Agreement" with Blitz-Weinhard Co., whereby defendant Pabst acquired all rights to Olde English 800 Malt Liquor. Blitz-Weinhard then served as a marketing division for defendant Pabst for Olde English 800. In August 1979 plaintiff placed an order with defendant Pabst for 2,184 cases of Olde English 800. Defendant Pabst did not fill the order. It contended that the right to distribute Olde English 800 had been granted to defendant Jeffreys. It also contended that it was not obligated to sell Olde

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English 800 to plaintiff because the contract did not include malt liquor.

Plaintiff then commenced this action for breach of contract. The court, sitting without a jury, found that defendant Pabst had breached the contract. It awarded plaintiff \$168,000 for the diminution in the value of his franchise after the breach and \$150,000 in punitive damages.

Defendant Pabst appeals.

II.

Defendant Pabst first contends the court erred in finding that it breached its contract with plaintiff by not selling Olde English 800 to plaintiff. It is undisputed that defendant Pabst did not sell Olde English 800 to plaintiff. This would not constitute a breach, however, unless the distributorship agreement, considered with the amendment, required such sale. Thus, the resolution of the issue depends on the interpretation given the agreement.

The court made findings of fact to the effect that Olde English 800 was a Pabst beer product and thus defendant Pabst was obligated to sell it to plaintiff. Ordinarily, "[t]he court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by them will be affirmed even though there is evidence contra." *Spivey v. Porter*, 65 N.C. App. 818, 819, 310 S.E. 2d 369, 370 (1984); see also *Hunter v. DeMay*, 124 Ill. App. 2d 429, 438, 259 N.E. 2d 291, 295 (1970). If the finding of fact is essentially a conclusion of law, however, it will be treated as a conclusion of law which is reviewable on appeal. *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E. 2d 921, 926 (1980); *Wachacha v. Wachacha*, 38 N.C. App. 504, 507, 248 S.E. 2d 375, 377 (1978); see also *Blackard Construction Co. v. Berry*, 13 Ill. App. 3d 768, 772, 300 N.E. 2d 627, 630 (1973). The interpretation of a contract "has uniformly been treated as a question of law subject to review by the appellate courts." *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E. 2d 761, 783 (1973); see also *Rosenbaum Bros. v. Devine*, 271 Ill. 354, 357, 111 N.E. 97, 98 (1915); *Blackard Construction Co. v. Berry*, *supra*.

The basic rule of construction for contracts is that the court

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seeks to ascertain the intent of the parties at the moment of execution. To ascertain this intent, the court looks to the language used, the situation of the parties, and objects to be accomplished. Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance.

Briggs v. Mills, Inc., 251 N.C. 642, 644, 111 S.E. 2d 841, 843 (1960); see also *Marshall Field & Co. v. J. B. Noelle Co.*, 81 Ill. App. 2d 409, 414, 226 N.E. 2d 454, 457 (1967); *Brown v. Scism*, 50 N.C. App. 619, 623, 274 S.E. 2d 897, 899-900, *disc. rev. denied*, 302 N.C. 396, 276 S.E. 2d 919 (1981). Further, "[w]here the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning and not what either party thought the agreement to be." *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 631, 224 S.E. 2d 580, 588 (1976); see also *Brown v. Miller*, 45 Ill. App. 3d 970, 972, 360 N.E. 2d 585, 587 (1977).

[1] Here, the agreement granted plaintiff the right to distribute "Pabst beer and ale." Plaintiff contends that the clause in the amendment providing that "hereafter Pabst and the distributor shall have the right to sell and distribute Pabst beer products in any place or area" expands the Pabst products it could sell. We disagree for two reasons. First, the agreement provided that "[n]otwithstanding the use hereinafter of the words 'beer and ale' and 'beer or ale,' or the use of the word 'Pabst,' this agreement shall apply to and cover only the product or products expressly first named above in this paragraph 1." It is clear that defendant Pabst used the same form contract with all of its distributors. It inserted in paragraph one the particular products the distributor was authorized to sell. In light of this, a reference to Pabst beer products in the amendment, instead of a reference merely to Pabst or to beer and ale, does not appear intended to expand the type of products a distributor was authorized to sell in paragraph one. Second, paragraph thirteen of the agreement provides that "neither this contract nor any of the terms thereof may be changed or modified or waived except in writing." Paragraph four of the amendment, although it uses the terms Pabst beer products, instead of merely the term Pabst, does not attempt to change or modify the type of Pabst products the distributor can sell. Instead, it refers to the geographical area or territory for which a distributor will have responsibility. Since there is no

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written agreement modifying the type of Pabst products to be distributed as required by paragraph thirteen, paragraph one determines whether defendant Pabst was obligated to sell Olde English 800 to plaintiff.

[2] Paragraph one grants plaintiff the right to sell "Pabst beer and ale." The question thus is whether those terms encompass malt liquor. Based upon the language of the contract and the evidence presented, we hold that the court was correct in finding that the contract required defendant Pabst to sell Olde English 800 to plaintiff.

The agreement states that "Pabst is engaged in the manufacture and sale of Pabst beer and Pabst ale." It makes no reference to any other type of product manufactured or sold by defendant Pabst. It thus could be concluded that any product manufactured or sold by defendant Pabst had to be included within the terms beer and ale. Further, the agreement grants plaintiff the right to sell "Pabst beer and ale." Since these are the only terms used to describe the products manufactured and sold by defendant Pabst, the logical interpretation is that the agreement grants plaintiff the right to distribute any product manufactured and sold by defendant Pabst. Plaintiff testified that "[p]rior to the time that Olde English 800 came into North Carolina, . . . there [were no] Pabst beer products authorized in this state that [plaintiff] did not distribute."

There also was sufficient evidence, though not decisive on the interpretation issue, to support the conclusion that the terms "Pabst beer and ale," as used in the agreement, included Olde English 800. First, plaintiff testified that his understanding of the agreement was that he was authorized to distribute any product defendant Pabst manufactured. Second, a bill of lading sent to defendant Jeffreys from defendant Pabst refers to "malt beverage beer." Third, the top of a case of Olde English 800 contained the language "rotate your stock, put new stock, higher numbers behind or beneath present stock, keep selling fresh beer." Fourth, in a semi-annual report to stockholders, defendant Pabst used the term beer to describe all Pabst products sold. The secretary for defendant Pabst stated that in the report beer was used as "a generic word [which] include[d] beer, ale, malt liquor, stout, saki." Finally, there was evidence that although there is a technical

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distinction between the way beer and malt liquor are brewed, and in their alcohol content, they often are referred to as the same product by persons in the trade.

For these reasons, we hold that the court was correct in finding that defendant Pabst was obligated under the agreement to sell Olde English 800 to plaintiff, and in concluding that the failure to do so constituted a breach.

III.

[3] Defendant Pabst next contends that if there was a breach of the contract, it should not be liable because "the decision not to sell Olde English 800 to plaintiff was made by another company, the Blitz-Weinhard Co." It argues that Blitz-Weinhard Co. was "a wholly-owned subsidiary of Pabst [and] had full responsibility for all marketing decisions with respect to Olde English 800 and all other Blitz brands."

Defendant cites *CM Corp. v. Oberer Development Co.*, 631 F. 2d 536 (7th Cir. 1980); *American Trading & Production Corp. v. Fischbach & Moore, Inc.*, 311 F. Supp. 412 (N.D.Ill. 1970); and *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967), as authority for the proposition that it is inappropriate to pierce the corporate veil unless the subsidiary is the "mere instrumentality" of the parent. Although these cases do stand for that proposition, their facts are distinguishable from those here.

In *CM Corp.* plaintiff brought an action for breach of contract and breach of warranty against a construction contractor and its corporate parent. All contracts had been entered into with the construction contractor, and it was only after the construction contractor became insolvent that plaintiff sought to recover from the parent. In *American Trading* plaintiff brought an action against a parent corporation and its subsidiary for damages from a fire caused by faulty electrical wiring installed by the subsidiary. The parent did not enter into the contract nor did it provide any of the wiring or perform any of the work. In *Huski-Bilt* plaintiff sought to hold a bank liable, upon prepayment of loans, for unearned premiums paid on credit life insurance policies. The bank had collected and delivered the money to the insurance company. The bank and three of its officers also owned the majority of stock in the insurance company. The Court held that the bank and

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the insurance company were separate corporations and mere ownership of stock was insufficient reason to hold one liable for the actions of the other.

Here, the court made the following finding of fact:

12. On March 31, 1979 PABST and BLITZ entered into a Purchase of Asset Agreement whereby PABST obtained, *inter alia*, all rights to the brand name "OLDE ENGLISH 800 MALT LIQUOR," and the right to manufacture and market said product; thereafter, and prior to the commencement of this action, PABST began to manufacture the PABST beer product, "OLDE ENGLISH 800" and became legally authorized to sell it to its distributors in the State of North Carolina. B-W [BLITZ-WEINHARD COMPANY] was formed by PABST and constituted a marketing division for a few months thereafter.

The court's findings "are conclusive if supported by any competent evidence, and judgment supported by them will be affirmed even though there is evidence contra." *Spivey v. Porter, supra*; see also *Hunter v. DeMay, supra*. There was sufficient evidence to support the finding that defendant Pabst manufactured and sold Olde English 800, while Blitz-Weinhard served merely as a marketing division. Further, plaintiff previously conducted all its negotiations with defendant Pabst and had entered into the distributorship agreement with defendant Pabst.

In the cases discussed above, the plaintiffs had dealt exclusively with subsidiaries and then had sought to hold parent corporations liable. The foregoing findings, which are supported by competent evidence, establish that this is not the situation here. We thus find the cases cited by defendant not controlling, and its contention without merit.

IV.

[4] Defendant Pabst also contends the case should be reversed because the court's ruling was based upon a misapprehension of the law. If the misapprehension of the law does not affect the result, however, the judgment will not be reversed. See *Lowe v. Department of Motor Vehicles*, 244 N.C. 353, 93 S.E. 2d 448 (1956).

The following findings of fact are at issue:

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11. [A]ccording to the customs and practices of the beer distributors in North Carolina against dual distributors, BOWLES had the right to expect said franchise rights to be exclusively its own, notwithstanding the written agreement to the contrary.

. . . .

19. That the greater weight of the evidence indicates that "OLDE ENGLISH 800" MALT LIQUOR is a PABST beer product and that only PABST had the right to sell said beer product to its distributors in the State of North Carolina; that PABST contracted with JEFFREYS in early August, 1979 for JEFFREYS to distribute "OLDE ENGLISH 800" MALT LIQUOR in the counties of Wayne, Wilson, Lenoir and Greene, the identical area of primary marketing responsibility as that contracted to BOWLES, thereby preempting BOWLES' rights and effecting a wrongful partial termination of its franchise rights.

The parties in paragraph four of the amendment provided that "hereafter Pabst and the distributor shall have the right to sell and distribute Pabst beer products in any place or area that, and to any person to whom, Pabst or the distributor may be lawfully authorized so to do."

Since the express terms of a contract generally control over industry customs or usages of trade, Ill. Ann. Stat. ch. 26, § 1-205(4) (Smith-Hurd 1963); N.C. Gen. Stat. § 25-1-205(4) (1965), the court erred in finding that plaintiff had the right to expect its franchise rights to be exclusive. It was irrelevant whether defendant Pabst sold Olde English 800 to other distributors in the area, since the issue was whether defendant Pabst breached its agreement by not selling Olde English 800 to plaintiff. As stated earlier, there was sufficient evidence to support the court's conclusion that defendant Pabst breached its agreement. Thus, the court's findings in paragraphs eleven and nineteen could not have affected the result. See *Lowe v. Department of Motor Vehicles*, *supra*; *Industries, Inc. v. Construction Co.*, 29 N.C. App. 270, 224 S.E. 2d 266, *disc. rev. denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976).

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V.

Defendant Pabst next contends the court erred in its award of compensatory damages. The court made the following findings of fact regarding damages:

17. Considering BOWLES' Answers to defendant PABST'S Interrogatories, the testimony of BOWLES' President, and the testimony of officers and employees of JEFFREYS and PABST, BOWLES suffered a loss of profit in the amount of at least \$100,000.00 as a result of the malicious breach of said contract by PABST in its successful effort to put BOWLES out of business.

18. As a proximate result of PABST'S malicious breach of its obligation to sell PABST beer products to BOWLES and its successful efforts to put BOWLES out of business, the value of BOWLES' franchise right to distribute PABST beer products in the counties of Wayne, Wilson, Greene and Lenoir was diminished from its value of \$169,000 before said breach to a value of only \$1,000.00 after said breach, considering that said franchise was diminished by the loss of goodwill, loss of reputation among its customers and bankers and was in fact sold for only \$1,000.00 by BOWLES in 1980.

The court did not award plaintiff the \$100,000 in lost profits found in the first of the above findings, but did award the \$168,000 in diminution of the value of plaintiff's franchise found in the second.

[5, 6] Defendant Pabst argues that it should not be liable for damages for diminution of value because of the following clause in the agreement:

11. . . . Under no circumstances shall Pabst be liable for any loss of profits by distributor or for any part of distributor's sales promotion, organization, business investment, operating or other expenses

It is clear that parties may limit contractually or exclude consequential damages "unless the limitation or exclusion is unconscionable." Ill. Ann. Stat. ch. 26, § 2-719(3) (Smith-Hurd 1963); N.C. Gen. Stat. § 25-2-719(3) (1965). In order to avoid a finding of unconscionability, the contract must provide "minimum adequate remedies." See J. White & R. Summers, Handbook of the Law

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Under the Uniform Commercial Code § 12-11, at 472-73 (1980). As the drafters of the Uniform Commercial Code stated, "[i]f the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." Ill. Ann. Stat. ch. 26, § 2-719 official comment 1 (Smith-Hurd 1963); N.C. Gen. Stat. § 25-2-719 official comment 1 (1965). Courts rarely find limitation clauses in transactions between experienced businessmen unconscionable. J. White & R. Summers, *supra*, § 12-9, at 463. When the parties specifically list the types of consequential damages to be excluded, only those consequential damages are excluded.

[7] Here, the provision in paragraph eleven, *supra*, was the only reference to damages in the agreement. It does not state that it excludes all consequential and special damages, but lists the items that defendant Pabst would not be liable for. The paragraph clearly does exclude loss of profits, and the court thus was correct in not awarding the \$100,000 it found plaintiff had suffered in lost profits. Although the list of items excluded is extensive, we do not believe it includes damages for the diminution of value of the franchise, however. Even so, an issue remains as to whether the evidence supports the award of \$168,000 for diminution of value of the franchise.

[8] Since the court was sitting without a jury, its findings "are conclusive if supported by any competent evidence, and judgment supported by them will be affirmed even though there is evidence contra." *Spivey v. Porter*, *supra*; see also *Hunter v. DeMay*, *supra*. Here, the evidence relating to the diminution of value of the franchise came from plaintiff's financial statements, income tax returns, and contract for sale of the distributorship.

The financial statement for the year ending 31 December 1978 stated that the value of the franchise was \$168,407, and the value of the buildings and other depreciable assets was \$37,431. The tax returns for the year ending 31 December 1979 stated that the value of the franchise was \$168,407, and the value of the buildings and other depreciable assets was \$33,641.

The contract for sale of the distributorship also was entered into on 31 December 1979. This was four months after the breach of the contract between plaintiff and defendant Pabst. It also was

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four months after plaintiff filed this action, and two months after defendant Pabst filed a counterclaim seeking to terminate the distribution agreement. In the contract for sale the purchase price was \$175,000. The breakdown was as follows:

Good Will and customer lists	\$1,000.00
Noncompetition Covenant from Seller Corporation	\$5,000.00
Trucks, physical equipment, and other personal property	\$169,000.00

Based on the above evidence, the court concluded that the diminution of value was \$168,000, and that plaintiff was entitled to that sum as compensatory damages. We disagree.

The evidence also showed that plaintiff had franchise agreements with several companies, not just with defendant Pabst. The contract for sale states that it is contingent upon the buyer "being granted the necessary approvals, licenses, and Franchise Agreements" from the following:

(a) Franchise Agreement acceptable to Buyer from Pabst Brewing Company for Pabst, Pabst Extra Light, Andeker and Red White and Blue.

(b) Country Club beer and malt beverage.

(c) Pearl beer and malt beverage.

(d) Century Brewing Company for Champale and Pink Champale.

(e) Perrier Mineral Water.

(f) Pennsylvania Dutch Birch Beer.

(g) Yoo Hoo Chocolate Drink.

Thus, the purchase price included the right to sell all of the above brands.

Further, the \$168,407 listed in the financial statements of plaintiff and labeled as the value of the "franchise" appears to be the total value for the right to sell all the above brands, not just Pabst. Plaintiff stated that the franchise figure on 31 December 1974 was \$25,000. In 1975 plaintiff purchased Bagley Wholesale

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and thereby acquired a franchise agreement with defendant Pabst. The financial statements for plaintiff then show that on 31 December 1975 and 31 December 1976 the franchise amount was \$144,406. In 1977 plaintiff entered into an additional agreement with Champale which gave him the right to distribute Champale beer products in additional territory. The financial statement for plaintiff for the year ending 31 December 1977 listed the value of plaintiff's franchise as \$168,407. Plaintiff testified that the increase was due to acquiring the rights from Champale. Thus, although the financial statements and tax returns summarily state that the value of the franchise was \$168,407, it does not appear that the entire amount was attributable to the agreement with defendant Pabst.

The court, however, made no finding as to what portion of the \$168,407 was attributable to the agreement with defendant Pabst and what portion was attributable to agreements plaintiff had with other companies. Neither did the court make such findings in regard to the contract for sale. These findings were essential to a proper award of compensatory damages, since a breaching party is liable only for damages "naturally and proximately caused by the breach." *Sineath v. Katzis*, 218 N.C. 740, 757, 12 S.E. 2d 671, 682 (1941). Thus, defendant Pabst would be liable only for the diminution in value resulting from plaintiff's inability to sell Olde English 800.

VI.

[9] Defendant Pabst finally contends the court erred in awarding \$150,000 in punitive damages. Our Supreme Court has stated the rule for awarding punitive damages in a contract action as follows:

[P]unitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. . . . But when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. . . . Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages.

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Stanback v. Stanback, 297 N.C. 181, 196, 254 S.E. 2d 611, 621 (1979); see also *St. Ann's Home for the Aged v. Daniels*, 95 Ill. App. 3d 576, 580, 420 N.E. 2d 478, 481-82 (1981). Further, "the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. . . . Such aggravated conduct was early defined to include 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness'" *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E. 2d 297, 301 (1976) (quoting *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922)); see also *Wallace v. Prudential Insurance Co.*, 12 Ill. App. 3d 623, 629-30, 299 N.E. 2d 344, 348-49 (1973).

Here, the court's findings were insufficient to support an award of punitive damages. The court made conclusions that the breach was "willful," "intentional," "in reckless disregard of the rights of [plaintiff]," and "malicious." The evidence, however, is more indicative of a good faith dispute over interpretation of the contract. It does not establish aggravated tortious conduct as well. It thus falls short of establishing the "degree of reprehensibility required . . . to award punitive damages when the dispute grows out of a breach of contract." *Burger Chef Systems, Inc. v. Melfred Co.*, 547 F. 2d 786, 791 (4th Cir. 1976); see also *Florsheim v. Travelers Indemnity Co.*, 75 Ill. App. 3d 298, 310, 393 N.E. 2d 1223, 1233 (1979); *King v. Insurance Co.*, 273 N.C. 396, 398, 159 S.E. 2d 891, 893 (1968). We thus vacate the award of punitive damages.

VII.

With the exception of the portions relating to plaintiff's damages, the judgment is affirmed. The portions relating to plaintiff's damages are vacated, and the cause is remanded for findings and entry of an appropriate award on the issue of compensatory damages only.

Affirmed in part, vacated in part, and remanded.

Judges HEDRICK and JOHNSON concur.

Thorpe v. DeMent

JUNIOUS THORPE, ADMINISTRATOR OF ESTATE OF SHIRLEY ANN THORPE, DECEASED,
JUNIOUS THORPE, INDIVIDUALLY, AND MARY BUNCH THORPE v.
RUSSELL W. DEMENT, JR., PHILIP O. REDWINE, SHERMAN A.
YEARGAN, JR. AND GARLAND L. ASKEW, DOING BUSINESS AS DEMENT,
REDWINE, YEARGAN AND ASKEW, ATTORNEYS AT LAW

No. 8310SC130

(Filed 3 July 1984)

**Attorneys at Law § 5.1; Limitation of Actions § 4.1— attorney malpractice action
barred by statute of limitations**

The trial court properly found that a legal malpractice action for damages against defendant attorneys-at-law for their alleged negligence in failing to present the plaintiffs' wrongful death claim to the personal representative of the tortfeasor's estate within the time specified in G.S. 28A-19-3 was barred by the statute of limitations provided by G.S. 1-15(c). Plaintiffs' loss of the right to recover from the general assets of the estate resulted from the original omission of the defendants in failing to make a timely presentment of the claim pursuant to G.S. 28A-19-3, and by virtue of the fact that defendant DeMent informed plaintiffs of his omission on or about 17 November 1977, the plaintiffs were at the very least put on inquiry notice of the possible cause of action for legal malpractice at that time.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Brewer, Judge*. Judgment entered 20 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 12 January 1984.

This is a legal malpractice action for damages against defendant attorneys-at-law for their alleged negligence in failing to present the plaintiffs' wrongful death claim to the personal representative of the tortfeasor's estate within the time specified in G.S. 28A-19-3. The action arises out of the defendant law firm's handling of a wrongful death action on plaintiffs' behalf. The plaintiffs' intestate, Shirley Ann Thorpe, was killed on 16 April 1976, in a collision between her vehicle and a motor vehicle operated by Robert Manson Wilson. Both Ms. Thorpe and Mr. Wilson died upon impact. On 30 April 1976, defendants, DeMent, Redwine, Yeargan & Askew, through Russell W. DeMent, Jr., undertook to represent plaintiffs for all purposes in connection with the death of Shirley Ann Thorpe. Junious Thorpe became the administrator of the estate of Shirley Ann Thorpe on 14 May 1976.

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The administrator of Wilson's estate had given notice by publication to creditors of the estate on 30 April 1976. Other than a letter to Wilson's insurer, no notice of a claim for Thorpe's wrongful death was given to the Wilson estate until the filing of a complaint on 11 May 1977. In July 1977, Wilson's estate filed an answer asserting that the action was barred on the ground of non-notification of the claim under the provisions of G.S. 28A-19-3.

By mid-November, 1977, DeMent informed Thorpe that he had failed to give notice directly to the Wilson estate. At about the same time, through DeMent, the Thorpes received an offer to settle the case of *Thorpe v. Wilson* (Wake County No. 77CVS2053) in the amount of \$27,500. The Thorpes considered and rejected the settlement offer. Shortly thereafter, Thorpe dismissed DeMent as counsel and obtained a new counsel to represent the estate.

On 11 July 1978, the Wilson estate filed a motion for summary judgment on the ground that there was no genuine issue as to any material fact as shown by the pleadings, answers to interrogatories and admissions of fact, and that, therefore, defendants were entitled to judgment as a matter of law. The Superior Court ruled on the motion on 16 August 1979, granting summary judgment for defendants to the extent that coverage for the plaintiffs' claim was not provided by the decedent's liability insurance. In other words, the court ruled that at trial, plaintiffs' damages would be limited to the coverage provided in Wilson's liability insurance policy which was in force at the time of the collision.

The case of *Thorpe v. Wilson* (77CVS2053), was tried in Wake County Superior Court in May of 1981. The jury awarded plaintiffs \$85,000 and judgment was accordingly entered in favor of plaintiffs in that amount. The insurance proceeds applicable to plaintiffs' claim amounted to \$50,000. Upon appeal by both parties, this Court affirmed the trial court's ruling on plaintiffs' ability to recover damages only to the extent of the insurance coverage. *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E. 2d 675 (1982).

The present action, by the Thorpe estate against DeMent for his alleged negligence in failing to provide proper notice to the Wilson estate, was filed on 31 October 1979. By their complaint, plaintiffs sought recovery for the "loss or diminution of their

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rights to recover on their claims for damages" against the Wilson estate, and for their inability to recover by settlement from the estate or its insurance carrier. In January, 1980, the defendants moved for summary judgment on the ground that the action was time-barred. Argument on that motion was postponed until after this Court's opinion in the wrongful death action, *Thorpe v. Wilson, supra*, was filed on 20 July 1982. Argument on the defendants' motion was heard on 10 November 1982. Plaintiffs were then seeking to recover damages in the amount of \$35,000, the difference between the jury verdict in their favor and the available insurance proceeds to be applied thereto. On 20 December 1982, summary judgment for defendants was entered on the ground that the action was barred by the applicable statute of limitations, G.S. 1-15(c). Plaintiffs appealed.

Boyce, Mitchell, Burns & Smith, P.A., by Greg L. Hinshaw, for plaintiff appellants.

Van Camp, Gill & Crumpler, P.A., by Douglas R. Gill, for defendant appellees.

JOHNSON, Judge.

The sole question presented by this appeal is whether the record discloses that the plaintiffs' claim is barred by the running of the statute of limitations. If so, defendants were entitled to judgment as a matter of law, and summary judgment under G.S. 1A-1, Rule 56, was appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

The defendants argue that the malpractice action was not filed within three years of accrual of the cause of action and that plaintiffs may not proceed under the latent or non-apparent injury discovery proviso of G.S. 1-15(c) because plaintiffs either discovered or should have discovered the fact of loss within two years of the accrual of the cause of action. Both parties essentially agree that the date of the last act of the defendant giving rise to the cause of action for failing to give notice to the Wilson estate was 16 October 1976. This was the last date upon which notice of the wrongful death action could have been validly presented to the personal representative of the negligent tortfeasor's estate. See G.S. 28A-19-3; *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E. 2d 675 (1982). The record reveals that on or about 17

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November 1977, defendant DeMent informed plaintiffs that he had failed to give notice directly to the Wilson estate. At the same time, DeMent also informed plaintiffs that the Wilson estate had offered to settle the claim for \$27,500. Plaintiffs rejected the settlement offer, obtained new counsel and proceeded to trial. On 16 August 1979, the order granting summary judgment in favor of the Wilson estate to the extent that coverage for the Thorpes' claim was not provided by the decedent's liability insurance was entered in the wrongful death action (*Thorpe v. Wilson*). On 31 October 1979, the present action for legal malpractice was filed, which was more than three years after 16 October 1976.

G.S. 1-15 provides, in pertinent part:

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

For a plaintiff to avail himself of the one-year extension under the latent injury discovery rule, then, he must show that:

- (1) the injury of economic loss originated under circumstances making the injury or loss not readily apparent at the time of its origin;
- (2) the injury or loss was discovered or should reasonably have been discovered by the plaintiff two or more years after

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the occurrence of the last act of the defendant giving rise to the cause of action;

(3) suit was commenced within one year from the date discovery was made; and

(4) the statute of limitations may not, in any case, have been reduced to below three years or extended beyond four years.

The last day on which a claim against the Wilson estate could have been made in order to prevent a bar against recovery from the general assets of that estate was 16 October 1976. That is the date on which the cause of action for the defendants' alleged malpractice accrued. G.S. 1-15(c); *Brantley v. Dunstan, supra*. Plaintiffs correctly contend that their injury or loss was not readily apparent at the time of its origin because they were entitled to rely on the defendants to make the required presentment to the Wilson estate within the time prescribed by statute.

The plaintiffs reposed their trust in the defendants to properly handle all of the claims arising out of their intestate's wrongful death on 16 April 1976. The contingency fee contract executed between plaintiffs and defendants on 30 April 1976 provided that defendant "Attorneys will devote their full professional abilities to case and clients agree to fully cooperate with the Attorneys." Part of the defendants' professional responsibilities included presentation of the plaintiffs' claim to the personal representative of the negligent tortfeasor, Robert Manson Wilson. The plaintiffs, who are laymen, became aware that their claim was not timely presented only when they were so advised by their attorneys, the defendants. Logically, defendants could only have advised plaintiffs of their omission *after* the close of the six month presentment period. Necessarily, then, the loss was "not readily apparent" to plaintiffs at the time of its origin. *See Black v. Littlejohn*, 67 N.C. App. 211, 214, 312 S.E. 2d 909, 912 (1984) (Johnson, J., dissenting) (action for medical malpractice; while physician-patient relationship continues, the plaintiff is not ordinarily put on notice of the negligence of the physician upon whose skill, judgment and advice she continues to rely).

However, we do not agree with plaintiffs' further related contentions (1) that they were not put on notice of their loss as a matter of law by reason of DeMent's informing them of his failure

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to make a timely presentment of their claim; (2) that "in the course of legal proceedings, a claimant may not suffer a 'loss' unless and until a judge so declares"; and (3) that only with entry of the 16 August 1979 order barring their recovery from the general assets of the Wilson estate, did they discover an "economic or monetary loss" resulting from defendants' omission. In their brief, plaintiffs concede that prior to Judge Britt's ruling in the wrongful death action, they were "aware that defendants had erred in failing to follow the presentment statute; their negligence was spelled out in G.S. 28A-19-3." However, plaintiffs argue that they did not know that such conduct constituted actionable negligence "because they had not yet suffered a loss," and therefore that their damages were not then apparent. We reject this interpretation of the "loss" to be discovered under the proviso of G.S. 1-15(c).

The plaintiffs' argument depends upon the conclusion that their loss could not have occurred, and thus could not have been discovered, until their damages were made clear to them and that this happened only when the trial court ruled on the summary judgment in August, 1979. This conclusion confuses the *fact* of loss with the *extent* of that loss. The only question resolved by the trial court's ruling on 16 August 1979 concerned the *extent* to which plaintiffs' potential recovery in the wrongful death action would be barred by the defendant's omission.

It is well established that in a case such as this, "loss" or the invasion of a legally protected right of the plaintiff's, occurs when the negligence occurs. In *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957), the Supreme Court held that ordinarily, a cause of action for negligent injury accrues when the wrong giving rise to the right to sue is committed, even though the damages at that time are nominal. Similarly, in *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965), a case involving recovery for the negligent performance of a building contract, the court stated the following rule:

Nominal damages may be recovered in actions based on negligence . . . The accrual of the cause of action must therefore be reckoned from the time the first injury, however slight, was sustained . . . It is unimportant that the actual or the substantial damage does not occur until later if the whole

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injury results from the original tortious act . . . [P]roof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action. (Citations omitted.)

Id. at 461-462, 142 S.E. 2d at 3. See also *Brantley v. Dunstan*, *supra*, and *Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E. 2d 673 (1979).

In this case, the "whole injury" to plaintiffs, the loss of their right to recover from the general assets of the estate, resulted from the original omission of the defendants in failing to make a timely presentment of the claim pursuant to G.S. 28A-19-3. Plaintiffs' reliance upon *Sunbow Industries, Inc. v. London*, 58 N.C. App. 751, 294 S.E. 2d 409, *cert. denied*, 307 N.C. 272, 299 S.E. 2d 219 (1982), for the proposition that a claimant may not suffer a "loss" in the course of legal proceedings "unless and until a judge so declares," is both misplaced and erroneous. In *Sunbow* the plaintiff alleged that the defendant attorney had failed to file a financing statement or otherwise perfect a security interest in assets the plaintiff had sold to another corporation, D.B.E., Inc., on 27 May 1976. D.B.E. filed a voluntary petition in bankruptcy on 24 February 1978. On 25 September 1978 the bankruptcy court held that the plaintiff had not perfected its security interest and was subordinated as a creditor. The plaintiff then filed a malpractice action on 31 December 1979. The defendant moved pursuant to G.S. 1A-1, Rule 12(b) to dismiss the complaint on the ground that it was not filed within the applicable statute of limitations. This Court reversed the dismissal of the complaint on the ground that the complaint had been filed within three years of the accrual of the cause of action, reasoning that the defendant attorney had a continuing duty to file the financing statement after 27 May 1976, "so long as the filing . . . would protect some interest of his client." The court first observed that if the financing statement had been filed a sufficient time prior to the filing of the petition in bankruptcy on 24 February 1978, the plaintiff would not have lost its lien, and then concluded as follows:

It is on that date that the three-year statute of limitations began to run. The complaint does not allege a fact that will necessarily bar the plaintiff's claim and it was error to dismiss the action.

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58 N.C. App. at 753, 294 S.E. 2d at 410. In *dictum* the court also reasoned that even if 27 May 1976 were considered to be the date of accrual, the plaintiff would not have been entitled to proceed under the proviso of G.S. 1-15(c) because his action was not timely even under that provision. Plaintiff had alleged that on 25 September 1978 the bankruptcy judge ruled that the security interest had not been perfected. The *Sunbow* court observed that, "He knew no later than that date of the alleged negligence and did not file this action until more than one year later." *Id.*

The dispositive issue in *Sunbow*, then, was not when the plaintiff discovered, or should have discovered, the loss, but rather, when the cause of action accrued for the defendant's negligent failure to file the financing statement. Here, the plaintiffs' rights could only be protected up to 16 October 1976 and they were directly informed of the fact of the alleged negligence on 17 November 1977, well within two years of the accrual of their cause of action. The "loss" that plaintiffs suffered thereby must be considered to be the *loss of their right to recover from the general assets of the Wilson estate*. By virtue of the fact that defendant DeMent informed plaintiffs of his omission on or about 17 November 1977, the plaintiffs were at the very least put on inquiry notice of their possible cause of action for legal malpractice. At that point in time, plaintiffs had before them the facts, or access to the facts, necessary for them to "discover" both their attorney's negligence and the consequent loss of their legal rights against the Wilson estate. In other words, plaintiffs had constructive knowledge of all of the essential elements of a complete malpractice cause of action. See *Black v. Littlejohn*, *supra* (Johnson, J., dissenting); *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978) (medical malpractice; discovery of "injury" held to include both negligent act and the bodily injury or harm caused thereby). See also *Massey v. Litton*, 669 P. 2d 248 (Nev. 1983) (medical malpractice; "injury" to be discovered, either actually or presumptively, refers to "legal injury" which includes both the fact of damage suffered and the realization that the cause was the physician's negligence).

Accordingly, if as plaintiffs concede, the negligence of defendants was "spelled out in G.S. 28A-19-3," then as a matter of law plaintiffs are charged with the knowledge that a reasonable inquiry would have disclosed—that their claim against the estate

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was barred by that allegedly negligent omission as of 17 November 1977. In other words, as a matter of law, plaintiffs should have discovered their loss on or shortly after 17 November 1977. As we stated earlier, this date was well within two years of the accrual of plaintiffs' cause of action. Therefore, plaintiffs may not proceed under the four year discovery proviso of G.S. 1-15(c). Inasmuch as the complaint was not filed within three years of the last act of the defendants giving rise to the cause of action, the action was time-barred under G.S. 1-15(c) and summary judgment was properly entered in favor of the defendants.

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

The majority holding that plaintiffs' loss and damage occurred when defendants failed to timely file notice of claim with the Wilson estate and that only the amount of damage was then uncertain is contrary to both reality and the law, in my opinion. Plaintiffs suffered no loss whatever at that time and thus had no cause of action for the statute to run against, since neglect alone does not constitute a cause of action. Even though plaintiff had lost by defendants' neglect the right to enforce the wrongful death claim against the general assets of the Wilson estate, that had not resulted in pecuniary loss at that time and there was no certainty that it would ever do so. This is because the value of the claim was uncertain and unknown, \$50,000 worth of insurance was still available to pay it, and whether that amount would cover plaintiffs' damages or whether it would not and loss would thereby be sustained, no one knew. Thus, to say that plaintiffs' cause of action had nevertheless accrued because plaintiffs' loss had occurred and only the amount was uncertain is a self-evident sophistry. Plaintiffs then had no cause of action. What plaintiffs then had, and all that they had, as both plaintiffs and defendants then knew, was a potential cause of action. If the value of the wrongful death claim turned out to be no more than \$50,000, they knew that plaintiffs' potential cause of action would remain in-

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complete, since the amount was collectable from the insurance; but if the claim's value exceeded \$50,000, they knew that plaintiffs' potential cause of action would become a complete one for the excess. And it was not until May, 1981, a year and a half after this case was filed, that the value of the wrongful death claim was determined to be \$85,000 and plaintiffs' cause of action against defendants for \$35,000 became complete. That the value ultimately set by the jury exceeded \$50,000 does not obviate the fact, however, that until then plaintiffs had no actual cause of action against defendants. Because, if the jury had established that the claim was worth only \$50,000, or some lesser amount collectable from the available insurance, as it well could have done, nothing is clearer than that plaintiffs' supposed cause of action against defendants would have vanished into nothingness, notwithstanding the theorizing to the contrary about nominal damages. A defeasible interest in property the law authorizes; but causes of action that supposedly exist one day and are non-existent the next are an anomaly that the law has not yet recognized or dealt with, so far as my research reveals.

The judicial fiction that damage and loss occur and causes of action therefore accrue when negligence happens rather than when injury really occurs or is learned about leads to many anomalous and even pernicious results and it would be a great service to the law of this state if the Supreme Court abandoned it and returned to the sound principle that negligence causes of action accrue when the injury that is sued for occurs. That this fiction is a blemish on our jurisprudence that ought to be removed requires only a reading of the cases. In many cases since this wrong turn was made, including *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965) and *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957), followed by the majority, the salutary principle, universally approved, that wrongdoers are not to profit by their own wrongs, was ignored and defendants were given the benefit of statutes of limitation running against plaintiffs even though the defendants' negligence was secret, had caused no discernible injury, and the plaintiffs had absolutely no knowledge of it. And though it is universally conceded that the only legitimate purpose and function of statutes of limitations is to bar the enforcement of causes of action, once ripe, complete, and ready for adjudication, that have been permitted to wither and grow stale, yet the stat-

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utes have been held to run against and even bar causes of action in this state before the injury sued for even occurred. *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E. 2d 796 (1970). Which was inevitable, of course, and could have been anticipated when the Court first left the solid trunk of the law, which is that causes of action for negligence do not accrue until some real injury results therefrom, and started down the flimsy and fallacious limb of imaginary and theoretical injury. Nevertheless, what lawyer, or layman either, for that matter, can digest the proposition that the statute of limitations began to run against the State's cause of action for *Cessna's* airplane crashing into its building, not when the crash occurred, but four years earlier when *Cessna* sold the defective airplane to a stranger to the lawsuit? If any of the great satirists of Anglo-American jurisprudence, including Jonathan Swift and Charles Dickens, ever imagined anything as absurd and unjust, they apparently concluded it was too exaggerated to be either amusing or believable.

And though all lawyers and judges know that the true policy of the law is to discourage unnecessary and hasty litigation, the plain, unavoidable implication of this decision and those it follows is that people should sue upon a mere indication of wrongdoing and wait until later to ascertain if any real damages develop. This detrimental and indefensible policy should be repudiated. Public interest requires that people be able to know what they are about and why before they take their grievances to court or even have a right to. The orderly adjudication of real disputes is the court's business, not theorizing about imaginary disputes that are totally irrelevant to the practicalities of people deciding what to do about their legal rights and of lawyers advising them about them. For instance, if the *Jewell's* had learned that their furnace was defective before it blew up, they would not have sued the seller and no lawyer worth his salt would have advised them to; they would have asked the seller to make the minor, inexpensive adjustment that would have made the furnace safe. And the cause of action that they theoretically had for a small repair bill, which was never incurred because they did not know repairs were needed, had less than nothing to do with the actual cause that they later had for the destruction of their home. The public does not expect people to sue others and subject them to embarrassment, expense, inconvenience and strain when only a theoretical injury

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has resulted; and if that is so, and I know perfectly well that it is, it is too plain for debate that statutes of limitation should not be running against their right to sue for real injuries that later occur.

Some blemishes in the law cannot be corrected or concealed by euphemisms, legal or otherwise; and will not be erased by either time or reiteration. That which is not so does not become so by repetition. Nor does the burden to correct this situation rest with the Legislature. Nothing in our statutes required the interpretation given to them by the Justices and the Justices should remove the interpolations made. Many other courts have done so.

CALVIN DENTON v. SOUTH MOUNTAIN PULPWOOD COMPANY AND
HEWITT, COLEMAN & ASSOCIATES, INC.

No. 8310IC155

(Filed 3 July 1984)

Master and Servant § 50.1— workers' compensation—plaintiff not employee of defendant

The evidence established that plaintiff logger was not an employee of defendant pulpwood company at the time of his injury by accident but was an independent contractor where it tended to show that a grading contractor wanted the site in question cleared; defendant's agent contacted plaintiff and other loggers about helping to clear the site; defendant was shown maps of the boundary by defendant's agent and was instructed on the type and length of wood to cut; plaintiff had an independent business as a logger, customarily dealt with defendant as such, and was ordinarily free to sell his wood to anyone; plaintiff was compensated on the basis of the amount of wood he cut; defendant had no right to discharge plaintiff while he was cutting wood on the job site; defendant had not purchased the timber from the grading contractor; and defendant did not retain the right to control the manner in which plaintiff did the work. The fact that plaintiff believed that defendant pulpwood company owned the timber he was cutting and that he was covered by workers' compensation insurance was not determinative of whether an employer-employee relationship existed at the time of his injury.

APPEAL by defendants from order of the North Carolina Industrial Commission entered 15 September 1982. Heard in the Court of Appeals 16 January 1984.

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While cutting timber on 7 February 1981, the plaintiff, Calvin Denton, was injured by a chain saw. Plaintiff's claim for benefits under the Workers' Compensation Act was denied by the employer, the defendant South Mountain Pulpwood Company, and its servicing agent, Hewitt, Coleman & Associates, Inc. The matter was brought before the Industrial Commission. The issues raised were whether an injury by accident arising out of and in the course of the plaintiff's employment had occurred and whether an employer-employee relationship existed. Both parties presented evidence; plaintiff attempted to show that he was an employee of the defendant pulpwood company and the defendant attempted to show that plaintiff was an independent contractor.

The deputy commissioner found that the plaintiff had sustained an injury by accident arising out of and in the course of his employment. He also found that the plaintiff was an employee of the defendant South Mountain Pulpwood Company, and that an employer-employee relationship existed at the time of the compensable injury. The defendants appealed the deputy commissioner's decision to the Full Commission.

The Full Commission considered the record in its entirety and found no reversible error. It therefore adopted the opinion and award filed by the deputy commissioner and affirmed the results reached therein. Defendants appeal.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, for defendant appellants.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, P.A., by C. Scott Whisnant, for plaintiff appellee.

JOHNSON, Judge.

The sole question presented for review is whether the Industrial Commission erred in finding and concluding that the plaintiff was an employee of the defendant, and that an employer-employee relationship existed at the time of plaintiff's injury by accident. It is now well settled that a claimant who seeks to bring himself within the coverage of the Workers' Compensation Act has the burden of proving that the employer-employee relationship existed at the time of the injury. *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976); *Durham v. McLamb*, 59 N.C. App. 165,

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296 S.E. 2d 3 (1982); *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (1980). The question as to whether an employer-employee relationship existed at the time of injury is a question of jurisdictional fact, and the finding of this jurisdictional fact by the Industrial Commission is not conclusive, but is reviewable by the appellate court. *Lucas v. Stores*, *supra*; *Durham v. McLamb*, *supra*; *Lloyd v. Jenkins Context Co.*, *supra*. Thus, it is incumbent upon this Court to review and consider all of the evidence of record on appeal. *Durham v. McLamb*, *supra*.

The evidence before the deputy commissioner showed the following: The employer-defendant, South Mountain Pulpwood Company (South Mountain) is a wholesale broker of pulpwood. The company has approximately 15 employees who are considered regular employees; these employees are provided workers' compensation benefits based on the volume of timber they cut. The company buys timber, processes it and resells it. Not only will the company purchase timber from the general public, but at times it will buy timber deeds itself in order to cut and process the wood on a particular boundary.

When the company is to cut timber from a boundary that it has purchased, it will have its regular cutters and producers cut the timber and deliver the wood to the yard for processing. The company will also buy cut wood from farmers, the general public or from outside producers. The company purchases wood from approximately 75 outside cutters a year. The company has nothing to do with the timber secured by the outside cutters until they deliver it. The company has no direction or control over these outside cutters and does not provide them with trucks, saws or any other equipment. There are no specific contracts with these cutters; they simply bring wood into the yard as they will.

The plaintiff had dealt with South Mountain Pulpwood Company on his own before the date in question. In 1980, South Mountain paid the plaintiff \$31.00 per cord, for about 327 cords of wood, at a gross sum of about \$10,000. South Mountain had nothing to do with where that wood was located or cut, and had made no pre-arrangements with plaintiff relative to the cutting of that wood. The plaintiff would simply cut the wood and take it to the defendant wood yard for sale. On those occasions, the plaintiff himself would negotiate and pay the stumpage fee to the owner of

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the timber in amounts ranging from \$6.00 to \$12.00 per cord. Plaintiff would pay the stumpage and his other expenses from the gross sum collected upon sale for the cut wood. Plaintiff estimated his total gross income in 1980 to be about \$16,000.

On the evening of Friday, 6 February 1981, a grading contractor telephoned Paul Davis, the president of South Mountain, and informed him that he had a construction site which needed clearing within a week. He told Davis that he would sell the purchasable timber on the site for \$8.00 a cord. Mr. Davis told the grading contractor that he did not have enough available employees to cut the timber in such a short period of time, but that he would contact other experienced loggers about the work. He then called the company's Crouse Wood Yard and asked Gordon Brooks to contact some independent cutters who would be "interested in the buying and cutting of a portion" of the boundary.

According to Davis, his conversation with Gordon Brooks was merely to have Brooks let people know of the availability of the work and the fact that it needed to be done fairly quickly. Further, that the company did not contract with any of these independent cutters concerning the cutting of the subject timber; did not provide the cutters on the tract with any equipment; and did not withhold taxes for them. Davis estimated that 15 different crews were out on the particular tract trying to get the timber cut. As to the specific arrangement with plaintiff, Davis testified as follows:

It was my understanding that Mr. Denton purchased a portion of this wood. I told Mr. Brooks to tell him that it had to be cut within a week if he wanted to cut any of this wood, and that [the grading contractor] would sell it for \$8.00 a cord to anyone who would cut it within that time. He said he could cut it within a week.

Davis testified further that South Mountain considered plaintiff to be an outside cutter with respect to the subject tract, no different from any of the other 15 crews who were there on the day in question. South Mountain itself had only one producer there, and that was Mr. Brooks, who was cutting pulpwood. According to Davis, South Mountain had no direction or control over any of the other independent crews, including plaintiff, nor did they have any "power to kick anybody off of that particular

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tract." As to control over the manner of cutting the timber, Davis testified on direct examination as follows:

We have a requirement as to what size, type and length of timber we will buy, but there was no requirement as to how this wood must be cut. Regarding the crews working on that tract cutting heater wood, South Mountain had no say so over them at all. The wood did not have to be brought to our yard, but if it were, we would not purchase it if it was not cut to our specifications.

On cross-examination, Davis admitted that he was not present when Mr. Brooks had the conversation with the plaintiff regarding the tract and that he had no personal knowledge of the terms of their conversation.

I was not present, but my instructions to Mr. Brooks were specific. I told him the terms of the contract, what was being offered, what the conditions were, that this contract was to be offered to the public, and that anybody could cut it in that week. Mr. Brooks supposedly told [plaintiff] that the tract was being cleared by [the grading contractor].

Davis also stated that the tract was not sold as a boundary, but was offered to anyone who would cut it during that period of time; that he did not "negotiate" this tract, but only knew what the price was per cord; and that he "assembled this information and gave it to anyone as a favor" to the grading contractor.

The owner of the tract told me what he wanted and what the terms were, and that I was to offer it to the public.

In addition, Davis testified that he personally went to the tract to see that South Mountain's crew did not "get off the boundary," but that his company was not "ultimately responsible" for the clearing of the tract. Further, that he specifically told plaintiff that he could sell the wood that he cut to anyone. The wood that plaintiff did cut prior to his injury was subsequently taken to South Mountain's wood yard in plaintiff's truck. According to Davis, "we were doing Mr. Denton a favor," by taking his wood.

Plaintiff testified that he had dealt with South Mountain on his own in the past, but that on those occasions the company had nothing to do with where the timber was cut or where the bound-

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ary was located. On this occasion, however, Mr. Brooks, an employee of South Mountain, called plaintiff on the Friday evening before the accident and asked plaintiff "to help get a boundary out." Plaintiff testified that he had nothing to do with the arrangements being made for the cutting of this particular wood and didn't know where the boundary was located. To the best of plaintiff's knowledge, Mr. Davis had done the negotiations for the tract in question. Plaintiff went to the South Mountain yard on Saturday morning. Mr. Brooks helped him unload some wood from his truck and plaintiff then followed Brooks to the boundary. There he was shown maps of the boundary by Mr. Davis and shown the boundary itself by Mr. Brooks. Plaintiff testified that Mr. Brooks had told him "that he needed this particular boundary cut as soon as possible" and that Mr. Davis gave him "directions relative to where I was to cut and what type of wood I was to cut. I was to cut five-foot lengths of pine. I was told to stay twenty feet back from the line." Further, that "the yard got the pine and somebody got the oak for heater wood. I was instructed to cut pine wood." Plaintiff worked close by Mr. Brooks until he was injured; only he and Brooks were cutting pine, the other crews were cutting heater wood. It was plaintiff's understanding that the wood he cut was to be taken back to the South Mountain wood yard.

Plaintiff also testified that he "had never performed a job such as this for South Mountain Pulpwood in this particular way." On cross-examination plaintiff stated that he customarily did not have "an arrangement" with South Mountain, but would buy wood himself, negotiating directly with the man who owned the timber. On this particular day, plaintiff did not purchase any of this timber.

On this particular tract, I was not under an obligation to pay the owner for the wood; South Mountain was to take out \$8.00 on the cord stumpage fee, to pay the owner. South Mountain would take out \$8.00 a cord and hold it out of the wood.

Plaintiff did not know who the owner of this boundary was. Plaintiff admitted that he had not been told directly that South Mountain owned the timber, but stated that he "was under the impression" that it did.

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Plaintiff also testified as follows regarding the defendant's ability to control the work done:

Mr. Brooks would not have been able to take any action against me if I had been unable to complete this job because of inattention or not doing my job, unless I hauled some wood to some other yard. If they got me for stealing wood or if I had not gotten the wood out, he would get somebody else.

Additionally, plaintiff admitted that "nobody was forcing me to work on this particular day."

On redirect examination, plaintiff testified as follows regarding his understanding of the contract between South Mountain and himself:

As far as I understood it, my only obligation was to take the wood back to South Mountain. The people cutting heater wood were in no way associated with South Mountain, as far as I know. I had never worked on this basis with South Mountain before. I was under the impression that I was covered with insurance because I thought they bought the boundary. As far as I know, other cutters such as Champion provide coverage if they buy a boundary. I know a sawmill man that does.

Upon the foregoing evidence, the deputy commissioner made, *inter alia*, the following findings of fact relevant to the wood cutting arrangement between South Mountain and plaintiff:

5. Gordon Brooks called the plaintiff by telephone on February 6, 1981 and advised him of the urgent need to cut timber on a construction site. The plaintiff understood he was to furnish his truck and equipment and that the timber he cut was to be taken to the defendant employer's yard. He had never been to the construction site area and did not know the identity of the owner of the land and/or timber.

6. On the morning of February 7, 1981, the plaintiff drove his truck to the defendant employer's yard where he met Gordon Brooks and then followed him to the construction site. When they arrived at the construction site Paul Davis and Gordon Brooks showed the plaintiff maps of the area and Paul Davis instructed the plaintiff to cut pine timber up to 20 feet from

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the boundary line. The plaintiff had never worked in this manner with the defendant employer. There were a number of people, including the regular employees of the defendant employer, who were at the site to cut timber.

The deputy commissioner made other findings of fact generally reflective of the evidence presented and then found and concluded that the plaintiff was an employee of the defendant employer on 7 February 1981 and that an employer-employee relationship existed between the parties on that date.

Defendant contends that the evidence shows that plaintiff was not an employee, but rather was an independent contractor under the tests established in *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944) and *Lloyd v. Jenkins Context Co.*, *supra*. We conclude that plaintiff has failed to carry his burden of establishing the existence of an employer-employee relationship at the time of his injury by accident. *Lucas v. Stores*, *supra*; *Durham v. McLamb*, *supra*; *Lloyd v. Jenkins Context Co.*, *supra*. Rather, the evidence, considered as a whole, supports the conclusion that plaintiff was an independent contractor with respect to the employment at issue.

G.S. 97-2(2) defines an employee as one "who is engaged in an employment under an appointment or contract of hire or apprenticeship, express or implied, oral or written . . ." In *Lloyd v. Jenkins Context Co.*, *supra*, this Court set forth several factors considered to be determinative in finding the plaintiff to be an employee, as opposed to an independent contractor. These are as follows:

1. [T]he plaintiff was working for an hourly wage and not for a contract price for a completed job;
- (2) defendant's own witnesses testified a foreman could instruct the plaintiff in how to do the work. The fact that plaintiff was skilled in his job so that he needed very little supervision does not make him an independent contractor;
- (3) the plaintiff did not have an independent business as a carpenter;
- (4) the plaintiff worked full-time for Jenkins;
- (5) the defendant Jenkins apparently had the right to discharge the plaintiff at any time; and
- (6) there was no evidence that plaintiff had the right to employ people to assist him in the carpentry work without

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the permission of Jenkins . . . We also do not believe the plaintiff's characterization of himself as "self-employed" should govern. It is the evidence as to what the relationship was that determines and not what the plaintiff thought it was.

46 N.C. App. at 819, 266 S.E. 2d at 37.

In *Durham v. McLamb*, *supra*, this Court applied the *Lloyd* criteria and held the following factors to be determinative of an employer-employee relationship: (1) plaintiff was working for an hourly wage and not for a contract price; (2) plaintiff worked full-time for defendant; (3) defendant could discharge plaintiff at any time; (4) plaintiff did not have a business as an independent contractor. Factors which were not considered determinative were (1) the plaintiff's own assumptions as to the nature of the relationship; (2) the fact that plaintiff did not have to work regular hours; (3) the defendant's failure to withhold taxes from plaintiff's pay; and (4) the fact that plaintiff was skilled in his job so that he needed very little, if any, supervision. 59 N.C. App. at 169, 296 S.E. 2d at 6.

Essentially, plaintiff contends that he was an employee of defendant's on this particular job because he was called by Mr. Brooks and asked to help clear the site; he drove there with Brooks; was shown maps of the boundary by Mr. Davis and instructed on the type and length of wood to cut, as well as the need to stay 20 feet back from the perimeter; he worked nearby to Brooks prior to his injury; and because plaintiff did not negotiate the stumpage fee with the grading contractor. In addition, plaintiff believed, although he was never so instructed, that South Mountain owned the timber rights and that the wood that he cut was to be taken to the defendant's wood yard. In short, in the plaintiff's own words, he "had never performed a job such as this for South Mountain Pulpwood in this particular way" in the past.

The question is, however, whether the peculiar circumstances of this occasion of employment established an employer-employee relationship between plaintiff and defendant on 7 February 1981. We conclude that they did not. It is evident that the findings of the deputy commissioner that an employer-employee relationship had been created with respect to this particular job were er-

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roneously based, in large part, on the plaintiff's *subjective impression* of the terms of his "contract" with defendant, rather than upon the objective circumstances disclosed by the bulk of the testimony.

In contrast to *Lloyd* and *Durham*, the plaintiff in the instant case was not working for an hourly wage, but would be compensated for a completed job on the basis of the amount of wood that he cut. Plaintiff had an independent business as a logger or outside cutter or producer and customarily dealt with South Mountain as such. Plaintiff did not work full-time for South Mountain, but was ordinarily free to sell his wood to whichever yard he took it to. South Mountain had no right to discharge plaintiff at any time while he was cutting the wood on the job site at issue; the company had not purchased the site as a boundary from the grading contractor. The fact that plaintiff believed that South Mountain owned the timber and that he was therefore covered by insurance is not determinative. See *Lloyd v. Jenkins Context Co.*, *supra* and *Durham v. McLamb*, *supra*. Furthermore, Mr. Davis testified that he specifically told plaintiff that the wood could be sold to any wood yard.

Admittedly, plaintiff's case turns upon the terms of an oral contract which was negotiated between plaintiff and defendant's agent, Gordon Brooks, and the failure to present testimony from Mr. Brooks as to what *he* told plaintiff about this job renders resolution of the issue under discussion difficult. However, it is the plaintiff who must carry the burden of proving that an employer-employee relationship existed at the time of injury. See, e.g., *Lucas v. Stores*, *supra*. Under the tests of *Lloyd* and *Durham*, we cannot say that plaintiff has met his burden with respect to the factors of wages, full-time employment with defendant, defendant's right of discharge and the lack of a business as an independent contractor on the part of plaintiff himself. Nor can it be said that plaintiff has demonstrated that anyone from South Mountain "could instruct the plaintiff in how to do the work." *Lloyd*, *supra* at 819, 266 S.E. 2d at 37.

The leading case in North Carolina regarding the test for determining whether a worker is an employee or an independent contractor is *Hayes v. Elon College*, *supra*. In that case, the defendant Elon College wanted to rebuild its electric light

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system. The defendant's agent asked a representative of the system's electricity supplier, Duke Power Company, if the company could do the job. The Duke representative stated that his company could not agree to rebuild, but that it employed electricians who did jobs of that kind during their "off" hours, and that he would look into it. The Duke representative then talked with the various electricians and told them of the availability of a job to rebuild a part of the defendant's electric line for the lump sum of \$30. When the electricians spoke with defendant's agent, compensation was not mentioned. The electricians agreed to undertake and complete the job if the defendant would furnish a truck and two helpers. After some discussion regarding various aspects of the job, utility poles were shortened so as to clear the electric lines without cutting trees. The claimant was thereafter killed and work temporarily stopped. The defendant notified the other electricians that it wanted the job completed. They secured the assistance of a third electrician and worked each day after five o'clock and on Saturdays and Sundays until the job was completed.

In holding that the deceased was an independent contractor, as opposed to an employee, the court found that the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed, and what the workers are to do as the work progresses is decisive. The court observed that when this right to control appears, it is universally held that the relationship of master and servant or employer and employee is created.

Conversely, when one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses, is clearly an independent contractor. [Par.] The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.

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Continuing its analysis, the court listed the elements which "ordinarily earmark a contract as one creating the relationship of employer and independent contractor."

The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

224 N.C. at 16, 29 S.E. 2d at 140. The court went on to state that the presence of no particular one of these indicia is controlling, nor is the presence of all required. However, they are to be considered along with all other circumstances to determine whether the one employed has that degree of independence necessary to require his classification as independent contractor rather than employee.

As we stated earlier, the evidence clearly showed that plaintiff was engaged in an "independent business, calling or occupation" as a logger; that he was doing a specified piece of work—helping to clear the tract—at a fixed price, upon a quantitative basis according to the total amount of wood he cut, rather than working for hourly wages; that he was not subject to discharge for working in one method as opposed to another; that he was not in the regular employ of South Mountain; that he selected his own time; and that apparently plaintiff was free to use such assistance as he may have thought appropriate to help clear the tract, inasmuch as the grading contractor wanted the wood cleared as quickly as possible.

Turning then to whether South Mountain retained the right of control or superintendence over the plaintiff as to details, we find no sufficient evidence to support such a finding and conclusion on this crucial question. From the testimony received, it appears that the only instructions plaintiff received was that the area needed to be cut, that he was to stay 20 feet back from the line, and that the wood was to be cut in five-foot lengths of pine.

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He was given no other instructions, and was not given particular days or times that this was to be done. He was simply told that the wood should be cut as quickly as possible. Plaintiff testified that South Mountain would not have been able to take any action against him if he had been unable to complete his job because of inattention or failure to perform. Mr. Davis testified that South Mountain had no power to "kick anybody off" of that particular tract. South Mountain had not, in fact, purchased the tract as a boundary and it was open to the general public. The company had no control over either the wood or the people cutting the wood.

The foregoing circumstances lead to the conclusion that South Mountain did not retain the right of control or superintendence over the plaintiff in the execution of this work. Plaintiff's testimony that he had never worked for South Mountain under circumstances such as those present on the date in question is not itself sufficient to establish an employer-employee relationship at the time of his injury under either the test of *Hayes* or the test of *Lloyd* and *Durham*. Although it is evident that neither plaintiff nor defendant had had an arrangement with each other quite like this in the past, plaintiff's employment status on 7 February 1981 remained that of an independent contractor.

In conclusion, the Industrial Commission erred in finding and concluding that an employer-employee relationship existed at the time of plaintiff's injury and the order and award of workers' compensation benefits must therefore be

Reversed.

Chief Judge VAUGHN and Judge WEBB concur.

DUKE POWER COMPANY v. CITY OF HIGH POINT, ET AL.

No. 8318SC776

(Filed 3 July 1984)

1. Municipal Corporations § 23.3— furnishing electric service outside city limits

G.S. 160A-312 is the sole legislative authority for and the only restriction upon municipalities furnishing electric service outside their corporate limits.

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2. Electricity § 2.6; Municipal Corporations § 23.3— furnishing electric service outside city limits—reasonable limitations

Pursuant to G.S. 160A-312, a city has absolute authority to extend electric service to privately-owned premises within the corporate limits as well as to city-owned operations, whether inside or outside the corporate limits; further, the city is granted limited, rather than absolute, authority to provide electric service outside the corporate limits, so long as such service is within reasonable limitations.

3. Electricity § 2.3; Municipal Corporations § 23.3— furnishing electric service outside city limits—pre-annexation construction of system

The provisions of Part 2, G.S. 160A-331 to G.S. 160A-338, do not affect a city's right pursuant to G.S. 160A-312 to extend electric service outside its corporate limits; therefore, though the strategy of defendant city, who was a secondary supplier of electricity, to begin construction of its electric lines in the outlying territory after its annexation plan was enacted but before it became effective might result in the loss of potential post-annexation rights of plaintiff secondary supplier, nothing in the 1965 Electric Act restricts municipalities from adopting and implementing such strategy.

4. Electricity § 2.1— rights of secondary supplier

The absolute right of a secondary supplier of electricity to serve customers within its 300-foot corridor arises upon the effective date of annexation by a municipality, statutorily defined as the "determination date." G.S. 160A-332.

5. Electricity § 2.1; Municipal Corporations § 23.3— furnishing electric service outside city limits—reasonableness

In determining the reasonableness of a city's proposed extension of electric service pursuant to G.S. 160A-312, the court will consider the level of current service in the territory in question, the readiness, willingness, and ability of each competitor to provide electric service, the location of the territory in relation to the city limits, and the existence of any annexation plan by the city; however, this list of factors is not exclusive, and the court will consider all the facts and circumstances within each case before determining the reasonableness of a proposed extension.

6. Electricity § 2.1; Municipal Corporations § 23.3— furnishing electric service outside city limits—reasonableness

Defendant city's proposed extension of electric service was within reasonable limitations pursuant to G.S. 160A-312 based upon the city's subsequent annexation of the area, the city's long-term cost savings by providing its own service, and the State's policy upholding the purpose of the city's proposed extension—that of providing street lights within the newly-annexed area.

APPEAL by plaintiff and defendant from *Hobgood, Hamilton, Judge*. Judgment entered 24 February 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 May 1984.

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Both parties appeal from an order authorizing the City of High Point to construct electric lines for the purpose of providing street lights into an annexation area north of the City assigned to Duke by the North Carolina Utilities Commission.

Duke Power Company (Duke), an investor-owned public utility and the City of High Point (the City), a municipal corporation, currently provide electric service both within and outside the city limits of High Point. Prior to 1969, Duke provided electric service within the city limits pursuant to a franchise with the City. The franchise, which expired in 1969, contained a clause limiting Duke from selling electric lights or current in opposition to the City. Duke provides electricity in the annexation area outside the city limits pursuant to an assignment made to it in 1967 by the North Carolina Utilities Commission.

On 2 April 1981, the City enacted an ordinance annexing an area approximately six square miles north of the corporate city limits. The effective date of annexation was to have been 31 March 1982, but because of another lawsuit contesting the annexation, the area had not been annexed at the time of the trial of this case.

In the fall of 1981, the City advised Duke of its intention to extend electric lines into the annexation area for the stated purpose of providing street lights. Duke objected and commenced this action to enjoin the City from extending lines and thereby duplicating Duke's existing electric lines in the proposed annexation area. On 18 December 1981, the trial court, Judge Kivett presiding, issued a temporary restraining order enjoining the City from extending electrical lines into the proposed annexation area. On 27 January 1982, pursuant to Duke's motion, the trial court, Judge Helms presiding, issued a preliminary injunction further enjoining the City from extending its electric lines. Had the City not been thus enjoined, it could have completed the proposed line extension before 31 January 1983.

At the trial on the merits, the trial court, Judge Hobgood presiding, found in pertinent part: Duke currently serves approximately 1,411 residential, industrial, and commercial establishments within the City and provides approximately 260 street lights within the City paid for by the City. Duke serves electricity to approximately 1,347 premises within the annexation area and

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provides approximately 30 street lights to a subdivision within the annexation area paid for by the subdivision association.

The City currently provides electricity to approximately 23,699 residential customers, of which 132 are served by City electric distribution lines outside the corporate limits. The City provides electricity to 2,137 commercial customers, of which approximately nine are served by city distribution lines outside the corporate limits.

Both Duke and the City are currently furnishing adequate, continuous and reliable electric service to customers within and outside the corporate city limits. Duke is presently serving customers within the annexation area and is capable of furnishing service within presently unserved portions of such area. The City is capable of furnishing service within the annexation area if it is allowed to construct its own electrical distribution system. The City's proposed construction would at some points parallel and cross Duke's existing lines. The evidence showed that the City's estimated cost of construction would amount to \$175,000 to \$250,000. Even so, the City estimated that it could furnish street lighting within the annexation area at a cost of \$1.00 per street light per month cheaper than could Duke.

The annexation area is an attractive, high growth suburban area. Duke's expressed opposition to the City's extension of its lines in the annexation area is not to the provision by the City of street lighting, but to the potential rights the City may thereby acquire to serve and sell electricity to residential customers in the area.

The trial court concluded as a matter of law that the proposed extension by the City of its lines in the annexation area was within reasonable limitations and lawful. In reaching this conclusion, one of the facts and circumstances the Court considered was the future status of Duke once the area is annexed. The Court concluded that Duke would become a "secondary supplier" on the effective date of annexation and ordered that the preliminary injunction be dissolved and that the City proceed to construct its electric lines within the annexation area.

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Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and W. Winburne King, III, for plaintiff.

Spruill, Lane, Carlton, McCotter & Jolly, by John R. Jolly, Jr., Ernie K. Murray, and J. Phil Carlton, for defendant.

VAUGHN, Chief Judge.

I.

We first address Duke's appeal from the trial court order authorizing the City to extend its electric lines to an annexation area outside the corporate limits for the stated purpose of providing street lights. We have, in determining the City's right to extend electric service, divided our analysis into three sections. In Section A, we discuss the pertinent statutory provisions contained in Chapter 160A of the General Statutes and specifically the two bases of authority under G.S. 160A-312 authorizing the extension of service outside of a municipality. In Section B, we analyze the dichotomy between a City's rights to extend electric service outside City limits under G.S. 160A-312 and its rights to extend such service within City limits under G.S. 160A-331 to 160A-338 and we refute Duke's contention that a City's rights under G.S. 160A-312 are subject to the provisions of G.S. 160A-331 to 160A-338. Finally, in Section C, we examine the lawfulness of the City's extension in this case pursuant to G.S. 160A-312. For reasons herein set forth, we hold that such extension met the reasonable limitation standard imposed by G.S. 160A-312, the sole legislative restraint on the City's pre-annexation rights to extend electric service outside City limits.

A.

The provisions of Chapter 160A, Article 16 of the General Statutes define a city's right to construct and operate "public enterprises." Part 1 of Article 16, codified as G.S. 160A-311 through G.S. 160A-323, concerns, in general, the operation of "public enterprises," while Part 2 of Article 16, codified as G.S. 160A-331 through G.S. 160A-338 concerns specifically the operation of electric power generation and service within the corporate limits of a city. Contained in Part 1 of Article 16 is G.S. 160A-311, which defines the term "public enterprise" to include electric power generation, transmission, and distribution systems. Also

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contained in Part 1 is G.S. 160A-312, the statute we are asked to interpret in this case.

[1] The Supreme Court, in three decisions fundamental to the issues herein has established G.S. 160A-312 as the sole legislative authority for and the only restriction upon municipalities furnishing electric service outside their corporate limits. *State ex rel. Utilities Comm. v. Virginia Elec. and Power Co.*, 310 N.C. 302, 311 S.E. 2d 586 (1984); *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 309 S.E. 2d 209 (1983); *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974). G.S. 160A-312 does not affect a city's right to furnish electric service to a newly annexed territory *within* corporate limits, such right being determined solely by the provisions of Part 2, G.S. 160A-331 to G.S. 160A-338. We recognize that at the time of this action, the City had enacted an ordinance to annex the area in question and that at the time of this appeal, the area had been effectively annexed. See *McKenzie v. City of High Point*, 61 N.C. App. 393, 301 S.E. 2d 129, *review denied*, 308 N.C. 544, 302 S.E. 2d 885 (1983) (affirming the validity of the annexation ordinance). Nevertheless, for purposes of this appeal, we treat the area in question as lying outside the corporate City limits. While controversies arising after annexation concerning the City's right to extend electric service to the newly annexed territory are governed by G.S. 160A-331 to G.S. 160A-338, controversies arising before annexation concerning the City's right to extend electric service to a future annexation area are governed by G.S. 160A-312.

[2] G.S. 160A-312, in its first two sentences, provides two distinct bases authorizing the operation of a public enterprise, including an electric power system by a city outside its corporate limits. The first sentence of G.S. 160A-312 provides: "A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and the citizens." We interpret this part of the statute as granting the City absolute authority without limitation or restriction to provide electric service for the benefit of the City itself or its citizens, *i.e.*, those who live within the corporate limits. Pursuant to this part of the statute, a city has absolute authority to extend electric service to privately-owned "prem-

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ises"¹ within the corporate limits as well as to city-owned operations, whether inside or outside the corporate limits. It is upon this basis that we relied in the companion case filed simultaneously herewith in affirming the lawfulness of the City's extension of electric lines to three facilities—a pollution control plant, a garbage pulverizer plant, and a police academy—owned and operated by the City. *Duke Power v. City of High Point #1* (filed 3 July 1984).

The second sentence of G.S. 160A-312 provides:

Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

We follow Supreme Court precedent in interpreting this part of the statute as granting the City limited, rather than absolute, authority to provide electric service outside corporate limits. This part of the statute provides the second basis authorizing a city to extend service outside corporate limits as long as it is "within reasonable limitations." See *State ex rel. Utilities Comm. v. Virginia Elec. and Power Co.*, *supra* (hereinafter *Vepco*); *Lumbee River Elec. Corp. v. City of Fayetteville*, *supra* (hereinafter *Lumbee River*); *Electric Service v. City of Rocky Mount*, *supra* (hereinafter *Rocky Mount*). Since the street lights in this case were to be constructed and were intended to benefit those outside city limits, the City's authority in this case to extend electric service in order to provide street lighting emanates from the second basis of G.S. 160A-312.

B.

[3] Duke contends that the City's right to extend electric service to the annexation area in this case is subject not only to the reasonable limitation standard contained in G.S. 160A-312, but also to the provisions of G.S. 160A-331 to G.S. 160A-338, incorporated by reference in G.S. 160A-312. Duke bases its argument

1. "Premises" are defined in G.S. 160A-331(3) as "the building, structure, or facility to which electricity is being or is to be furnished."

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on the clause in the second sentence of G.S. 160A-312 providing that the City's rights are "[s]ubject to Part 2 of this Article," codified in G.S. 160A-331 to 160A-338. Though we disagree with Duke's proposed interpretation of G.S. 160A-312, we recognize and discuss in this section the dichotomy underlying Duke's appeal between the City's rights under G.S. 160A-312 to extend electric lines before annexation and City's rights under G.S. 160A-331 to 160A-338 to extend such lines after annexation.

The dichotomy is the result of legislation enacted in 1965 which both authorizes and restricts the rights of a city extending electric lines within its corporate limits, but has no application to a city extending lines outside its corporate limits. The 1965 Electric Act, enacted in an effort to curtail litigation and prevent wasteful duplication of transmission and distribution systems between investor-owned power companies and electric membership corporations, is contained in two parts: One part, codified as G.S. 62-110.2, sets out the rights of electric membership corporations and public utilities vying for customers outside city limits, but has no effect on the rights of a city supplier. See *Rocky Mount, supra*. The other part, codified as G.S. 160A-331 to G.S. 160A-338, sets out the rights of all suppliers, including a municipal supplier, but affects only those rights within corporate limits and has no effect on competitive rights outside city limits. Our discussion herein focuses on the provisions of 160A-331 to 160A-338.

Had the City begun construction of its electric distribution system *after* annexation, its and Duke's rights as competing electric suppliers would have been determined by the provisions of Article 2, G.S. 160A-331 to G.S. 160A-338. Born upon the effective date of annexation, statutorily defined as "the determination date," are the rights of "primary" and "secondary suppliers." G.S. 160A-331. G.S. 160A-331(4) defines "primary supplier" as "a city that owns and maintains its own electric system, or a person, firm, or corporation that furnishes electric service within a city pursuant to a franchise granted by or contract with, a city, or that, having furnished service pursuant to a franchise or contract, is continuing to furnish service within a city after the expiration of the franchise or contract." G.S. 160A-331(5) defines "secondary supplier" as "a person, firm, or corporation that furnishes electricity at retail to one or more consumers other than itself within the limits of a city but is not a primary supplier. . . ." Essential

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to Duke's argument is the assumption that upon the effective date of annexation, it will become a "secondary supplier," the City, a "primary supplier."

Had construction occurred after annexation, Duke would have had guaranteed rights pursuant to G.S. 160A-332, which defines and limits the rights of competing electric suppliers in three basic situations which we shall herein describe:

1. A "primary supplier" has the right to serve any "premise" initially requiring electric service except that a "primary supplier" may not infringe on the right of a "secondary supplier" to serve those "premises" guaranteed in situation #2, described below. *See* G.S. 160A-332(4), (7).

2. A "secondary supplier" has the right to continue serving "premises" it served before annexation and additionally to serve any "premise" located within a 300-foot corridor of its existing electric lines and more than 300 feet from the lines of a primary supplier. *See* G.S. 160A-332(1), (2).

3. Customers whose premises are located within 300 feet of the lines of both a "primary" and "secondary supplier" as well as customers whose premises are located only partially within 300 feet of the lines of a secondary supplier and more than 300 feet from the lines of a primary supplier may initially choose their supplier. G.S. 160A-331(5), (6). While G.S. 160A-332 guarantees the *post*-annexation rights of a secondary supplier, there is no comparable statute defining and guaranteeing the *pre*-annexation rights of competing electric suppliers.

The primary concern thus underlying Duke's contention is the loss of its potential *post*-annexation "corridor rights" if the City is allowed to extend electric lines prior to annexation to the outlying annexation area. In essence, Duke contends that if we allow the City to extend electric lines prior to annexation, in an area where Duke already has lines, the City will obtain rights to provide service to customers who so choose, and that such customers would have been exclusively Duke's had we not allowed such extension.

We recognize Duke's concern that the proposed extension of the City's lines before annexation may result in the loss of rights assured Duke had such extension occurred after annexation.

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Nevertheless, by legislative mandate, Duke's rights under Part 2, G.S. 160A-331 to 160A-338 do not arise until after the effective date of annexation. Duke's contention, therefore, based on the potential loss of prospective rights is premature. Until the effective date of annexation, Duke has no standing to contest the loss of a right not yet attained. See *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 261 S.E. 2d 21 (1979), *affirmed*, 301 N.C. 1, 269 S.E. 2d 142 (1980).

In holding that the provisions of Part 2, G.S. 160A-331 to G.S. 160A-338, do not affect a city's right pursuant to G.S. 160A-312 to extend electric service outside its corporate limits, we have not ignored the clause in G.S. 160A-312 providing that a city's right pursuant thereto is "[s]ubject to Part 2 of this Article." Rather, we construe this clause so as to heed two principles of statutory construction: The first principle involves the presumption that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein. *Rocky Mount, supra*. The second principle is that words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). An interpretation that best effectuates both principles of statutory construction is that the clause "[s]ubject to Part 2 of this Article" refers to those situations where a city extending its electric lines outside its corporate limits necessarily begins construction within its corporate limits. When a city extending service outside its corporate limits constructs lines beginning at some point within its corporate limits, then pursuant to G.S. 160A-312 and G.S. 160A-332, such lines as are within the city limits may not infringe on the guaranteed "corridor rights" of a secondary supplier.

By defining and restricting the rights of competing electric companies, the Legislature in the 1965 Electric Act, limited free competition among private electric suppliers in rural areas. It is for the Legislature, not for this Court to determine whether legislation other than G.S. 160A-312 is needed to curtail the competitive rights of municipal electric suppliers in rural areas. See *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663 (1969). It appears that the strategy of the City was to begin construction of its electric lines in the outlying territory

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after its annexation plan was enacted but before it became effective. While we realize that pre-annexation construction by the City may result in the loss of potential post-annexation rights of a secondary supplier, nothing in the 1965 Electric Act restricts municipalities from adopting and implementing this kind of strategy. *See Vepco, supra; Lumbee River, supra.*

[4] Under current legislation, the absolute right of a "secondary supplier" to serve customers within its 300-foot corridor arises upon the effective date of annexation, statutorily defined as the "determination date." *See* G.S. 160A-331, 160A-332. If the Legislature determines that the corridor rights of a secondary supplier deserve protection before the effective date of annexation, then it can guarantee such rights by defining the "determination date" when such rights arise as the date an annexation ordinance is adopted rather than the date an annexation plan is effected. Unless and until such time arises, we follow Supreme Court precedent in relying solely on G.S. 160A-312 in determining whether the City had legislative authority to extend its lines in this case.

C.

Our final consideration with regard to Duke's appeal is whether the City's proposed extension of electric service was within reasonable limitations pursuant to G.S. 160A-312. We conclude that it was.

[5] The Supreme Court, construing G.S. 160A-312, in *Rocky Mount, supra, Lumbee River, supra, and Vepco, supra*, has developed a list of factors to consider in determining the reasonableness of a city's proposed extension of electric service. These factors include: the level of current service in the territory in question, the readiness, willingness, and ability of each competitor to provide electric service, the location of the territory in relation to the city limits, and the existence of any annexation plans by the City.

[6] We do not interpret this list of factors to be exclusive, but rather, we think the Supreme Court intended that we consider all the facts and circumstances within each case, before determining the reasonableness of a proposed extension. *See Rocky Mount*, 285 N.C. at 144, 203 S.E. 2d at 844 (within reasonable limitations

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does not refer solely to the territorial extent of the venture, but embraces all the facts and circumstances affecting the reasonableness of the venture). In affirming the reasonableness of the City's proposed extension of electric service in this case, we have followed and expanded upon the Supreme Court analysis. Factors determinative to our holding in this case include the City's subsequent annexation of the area (*see Vepco, supra*), the City's long-term cost-savings by providing its own service, and a recognition of State policy upholding the purpose of the City's proposed extension—that of providing street lights within the newly annexed area.

If the only factors we were to consider in determining reasonableness were the comparative readiness of the suppliers, their current service levels, and their initial costs of providing service, we would be constrained to find the City's proposed extension unreasonable under G.S. 160A-312. The facts showed that Duke was immediately ready to provide the necessary service, while the City needed to construct its own electric distribution system to be equally as ready. Although the City was the major electric supplier within the city limits, it served no premises within the six-mile annexation area. Duke, to the contrary, served 1,347 premises within the annexation area and provided approximately 30 street lights to a subdivision within the annexation area. In *Vepco*, the Court made it clear that a court comparing the current level of service should focus particularly on the level of service within the area to be served, *i.e.*, the annexation area here.

But for the City's subsequent annexation of the territory in question and its intention thereby of providing street lights, the facts here would parallel those of *Rocky Mount*, the first Supreme Court case construing the reasonable limitation standard of G.S. 160A-312. In *Rocky Mount, Domestic Corporation*, an investor-owned utility, had been providing electric service in an area outside the city limits pursuant to an assignment by the North Carolina Utilities Commission. Domestic had lines in the immediate vicinity of an apartment complex outside the city limits and was ready, willing, and able to provide service to the complex. The complex, however, requested the City to provide the necessary service. In order to do so, the City had to extend its distribution lines approximately 675 feet. On these facts, the

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court held that the proposed service by the City exceeded reasonable limitations under G.S. 160A-312. *See id.* at 145, 203 S.E. 2d at 844. Like Domestic, Duke, in this case, already had lines in the proposed service area, assigned to it by the Utilities Commission, and was ready, willing, and able to provide the necessary service. Like the City of Rocky Mount, the City of High Point had to extend distribution lines in the annexation area in order to provide similar service. Nevertheless, other factors distinguish this case from *Rocky Mount* and show the reasonableness of the City's plan.

Unlike the Court in *Lumbee River*, we are not convinced that the initial construction costs in extending lines amount to unreasonable economic waste. In *Lumbee River*, the City had lines within the immediate vicinity of the outlying subdivision desiring electric service, while the electric company would have required five days of construction and \$11,700 to be equally as ready. On these facts, the Court held that service by the City was within reasonable limitations. *See* 309 N.C. at 739-40, 309 S.E. 2d at 217-18. Although the facts here showed that the City, in order to provide the necessary service, had to construct distribution lines at a cost of \$175,000 to \$250,000, we do not find this cost to be unreasonable in light of the City's long-term savings. The trial court found that the City could furnish street lighting within the annexation area at a cost of \$1.00 per street light per month cheaper than could Duke. In affirming the reasonableness of the City's proposed extension of electric lines, we have considered long-term benefits to the City and its taxpayers.

Central to our consideration of long-term benefits is the City's plans to annex and its subsequent annexation of the proposed service area. The annexation is a factor persuading us, as it did the Court in *Vepco* that "[the City's] extension of electric service . . . was and is 'within reasonable limitations.'" 310 N.C. at 307, 311 S.E. 2d at 589. There is no question but that upon the effective date of annexation the City had an absolute right to provide electric street lights. G.S. 160A-336. By allowing the City to construct electric lines in order to provide street lights *prior* to the effective date of annexation, we are upholding State policy to provide services within a newly annexed area on the same basis as such services are provided within the rest of the city. G.S. 160A-45(5); *see Fulghum v. Selma and Griffis v. Selma*, 238

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N.C. 100, 76 S.E. 2d 368 (1953); *see also* G.S. 160A-52 (authorizing expenditures for services prior to the effective date of annexation).

The purpose of the City's proposed extension distinguishes this case from past Supreme Court cases interpreting the reasonableness standard of G.S. 160A-312. While the purpose of the extension in *Rocky Mount*, *Lumbee River*, and *Vepco* was to provide electric service to specific customers for profit, the purpose of the City's extension here was to provide a municipal service to its inhabitants. The facts, as found by the trial court, showed that the City contributed any surplus generated by the operation of its electric distribution system to its general fund and that such surplus, in turn, constituted 25% of the City's tax base. By authorizing the pre-annexation construction of electric lines in this case, we are encouraging the City to perform its primary function—that of “provid[ing] local government within its limits and authorized service to its inhabitants . . .” *Rocky Mount*, 285 N.C. at 144, 203 S.E. 2d at 844.

For reasons heretofore explained, the trial court order authorizing the City's construction under G.S. 160A-312 is affirmed. Since the parties stipulated that the City could have completed construction before the effective date of annexation, lines constructed by the City in the annexation area shall be treated accordingly.

II.

In the second part of this opinion, we address the City's appeal from the trial court finding that upon the effective date of annexation, Duke would become a “secondary supplier.” As part of Conclusion of Law Number Seventeen, the trial court found that Duke would “as of the determination date, become a ‘secondary supplier’ relative to the annexation area” and that its “potential future status” was one of the “various facts and circumstances to be considered in determining whether the extension by the City was within reasonable limitations.” Without intimating an opinion regarding the status of Duke upon annexation, we vacate and set aside this Conclusion.

The “corridor rights” of a “secondary supplier,” which Duke contends to be, to extend service within an annexation area, do not arise until the determination date, *i.e.*, the effective date of

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annexation. G.S. 160A-331 and G.S. 160A-332. This case, however, arose before the "determination date." The question of prospective rights not yet at issue was improperly before the court.

As to Duke's appeal, the order is affirmed.

As to the City's appeal, the order is vacated.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. JAMES MILLER, ALIAS JAMES SMITH AND
DANIEL PEARCE ROBERTS

No. 8318SC993

(Filed 3 July 1984)

1. Criminal Law §§ 66.9, 66.16— identification of defendant—photographic identification— independent origin of identification

The trial court did not err in admitting in-court identification testimony of defendant by three witnesses, though some prior photographic lineups were unduly suggestive, since the court conducted an extensive *voir dire* of all three witnesses to determine the basis for their identifications, the photographic lineup shown to one witness was not unduly suggestive, and the in-court identifications of all three witnesses were of independent origin and therefore admissible.

2. Criminal Law § 98.2— sequestration of witnesses

There was no merit to defendants' contentions that three witnesses' in-court identifications of defendants were impermissibly tainted because the witnesses were present when the court asked one defendant to raise his hand to identify himself to the jury, and the trial court therefore did not err in denying defendants' motion to sequester the witnesses.

3. Criminal Law § 92.1— consolidation of offenses

The trial court did not err in granting the State's motions to join for trial both defendants who were charged with armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury since there was a transactional connection between the robbery and the assault; evidence concerning the armed robbery was relevant to the issue of the identity of the perpetrator of the assault; and one defendant's contention that joinder precluded him from testifying about his passive role in the robbery was irrelevant.

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4. Assault and Battery § 15.2— assault with a deadly weapon with intent to kill inflicting serious injury—instructions proper

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendants, acting in concert, robbed a victim and then fled in an automobile which they had stolen three days earlier, the vehicle was stopped by an officer, and defendant then shot him in the face, the trial court did not err in instructing the jury that, if the shooting of the officer happened during the commission of the armed robbery or during the flight therefrom, and the defendants had acted together in the commission of the robbery, they were both legally accountable for criminal acts occurring during their joint venture.

5. Criminal Law § 66— identification of defendant—no instruction on interracial identification

The trial court did not err in refusing to give a requested instruction on interracial identification, where there was no indication that race in any way affected the identification of defendants by the witnesses.

6. Criminal Law § 60.5— fingerprints instructions proper

The trial court did not err in denying defendants' request for a jury instruction concerning the probative force of fingerprint evidence, since there was no evidence from which the jury could infer that prints were left by defendants at a time or under circumstances not directly related to the crimes charged, and defendants did not meet their burden of showing prejudice, that is, that a different result would have been reached at trial.

APPEAL by defendants from *Rousseau, Judge*. Judgments entered 19 January 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 May 1984.

Each of the defendants was convicted of two charges: armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. As the State's evidence was extensive, our summary of it will necessarily be selective, with particular attention paid to those parts to which defendants' assignments of error are directed. The State's evidence, then, in pertinent part, tended to show the following: On the evening of 11 July 1982, Marvin Massengill was driving in downtown Greensboro looking for a woman to pick up. He ultimately negotiated with someone who appeared to be a woman, and followed her into room 306 at the Golden Eagle Motel. In the motel room, Massengill took off his pants before being confronted by an armed man who came out of the bathroom. While this man held him at gunpoint, the "woman" removed several hundred dollars from Massengill's pants pockets. The "woman" was later identified by Massengill and by other witnesses as defendant Miller. After defendants left the room,

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Massengill went to the front desk and told the desk clerk he had been robbed. The desk clerk called the police, and although Massengill originally told the police officer that he had been forced from the street into the motel room, after he was taken to the police station he described what actually happened.

Officer Parks of the Greensboro Police Department testified that on the night of 11 July 1982, he was participating in a stakeout at Gate City Chrysler-Plymouth because of some recent break-ins in the area. He testified that he observed defendant Miller on three occasions between 9:00 p.m. and 9:30 p.m., that he observed that defendant getting into a Ford automobile with a South Carolina license plate, and also observed a black male exit from a second floor room of the Golden Eagle Motel and enter the Ford. Officer Parks further testified that he followed the vehicle as it proceeded north, and checked its registration with police headquarters while following it. Upon receiving a report that the vehicle was improperly registered, Parks, who was in plain clothes, requested a marked patrol car to stop the vehicle. At approximately 10:20 p.m., Officer Farlow contacted Officer Parks over the police radio and pulled his patrol car behind the Ford and in front of Officer Parks' station wagon. Officer Farlow turned on his blue light and followed the Ford around a corner where it pulled over and stopped. Officer Parks testified that he observed Officer Farlow stop his vehicle and walk up to the Ford. He testified that he then heard what sounded like a firecracker and saw blue smoke rolling out of the driver's window of the Ford as it sped away. At that point, Parks, who had been approximately eighty-seven feet away, pulled his car closer and saw Officer Farlow lying in the street with a wound to his face. Officer Parks immediately radioed for help.

Officer Denny of the Greensboro Police Department testified that he investigated a wreck scene a short distance from where Officer Farlow was shot. Officer Denny observed a Ford automobile parked sideways in the front yard with the same South Carolina license plate as was on the car from which Officer Farlow was shot; he also observed fresh damage to a car parked in front of the residence and to the concrete steps leading up to the house. The residents of that house, Debra and Douglas Linkhous, both testified for the State. Ms. Linkhous testified that she and her husband were watching television between 10:30 p.m. and

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11:00 p.m. that night when she heard a car hit their house. Mr. Linkhous testified that when he ran outside, he observed a black male jump out of the driver's side of the car.

Other witnesses testified to the capture of the defendants later that evening, and to the discovery of money, tools, and other objects upon a search of the Ford automobile. A supervisor in the police laboratory testified that fingerprints taken from items discovered in the vehicle and items found in room 306 of the motel matched the fingerprints of defendant Miller and defendant Roberts.

State's witness Vernon Thurlby testified concerning events that occurred on 9 July 1982 in South Carolina. Thurlby testified that he was abducted and subsequently robbed in a motel room by a man and a "woman" who, after an extensive *voir dire* examination by the court, Thurlby identified as defendants Roberts and Miller.

Defendant Miller presented the testimony of a couple who lived nearby the spot where Officer Farlow was shot, both of whom initially testified that fifteen to twenty minutes elapsed before the police responded to Officer Farlow after he was shot. Both of these witnesses, however, ultimately testified to some uncertainty as to the length of time between the shooting and the arrival of the police. Defendant Roberts presented no evidence.

The jury found the defendants guilty of both crimes and they were each sentenced to thirty years imprisonment for the armed robbery charge and twenty years for the assault charge, the sentences to run consecutively. From the judgments imposing these sentences, defendants appeal.

Attorney General Rufus L. Edmisten, by John R. B. Matthis, Special Deputy Attorney General, John F. Maddrey, Assistant Attorney General, and Philip A. Telfer, Assistant Attorney General, for the State.

Adams, North, Cooke and Landreth, by Thaddeus A. Adams, III, for defendant-appellant Miller.

Appellate Defender Adam Stein, by Ann B. Petersen, Assistant Appellate Defender, for defendant-appellant Roberts.

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VAUGHN, Chief Judge.

[1] The defendants argue that the trial court erred in several rulings related to in-court identification testimony of the defendants by State's witnesses Marvin Massengill, Douglas Linkhous and Vernon Thurlby. Upon defendants' motion to suppress the identifications, Judge Rousseau held *voir dire* hearings and determined that (1) some of the prior photographic line-ups shown to Massengill and Thurlby were unduly suggestive and should be suppressed; (2) the photographic line-up shown to Linkhous was not unduly suggestive; and (3) the in-court identifications of all three witnesses were of independent origin and therefore admissible. We affirm Judge Rousseau's rulings and overrule these assignments of error.

The rules relating to the admissibility of in-court identification testimony are well-settled. Generally, a witness may make an in-court identification of a defendant and any uncertainty in that identification goes to the weight and not the admissibility of the testimony. *State v. Billups*, 301 N.C. 607, 616, 272 S.E. 2d 842, 849 (1981). Moreover, it has been established that a photographic line-up is an acceptable basis for an in-court identification. *State v. Bundridge*, 294 N.C. 45, 56, 239 S.E. 2d 811, 819 (1978). The general rule allowing in-court identifications is, however, subject to the exception if a defendant's due process rights are violated if the in-court identification is tainted by a prior confrontation in circumstances shown to be "unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Covington*, 290 N.C. 313, 324, 226 S.E. 2d 629, 638 (1976). Put more abstractly, the pretrial procedure must not offend fundamental standards of decency, fairness and justice. *State v. Williams*, 38 N.C. App. 183, 187, 247 S.E. 2d 620, 622 (1978).

When a defendant claims that an in-court identification has been tainted by an improper confrontation, the trial judge should conduct a *voir dire* examination, make findings of fact and decide whether the in-court identification is of independent origin. See *State v. Shore*, 285 N.C. 328, 339, 204 S.E. 2d 682, 689 (1974). An in-court identification is of independent origin and hence competent where the in-court identification is based on the witness' observations at the time and scene of the crime. *State v. Fate*, 38 N.C. App. 68, 72, 247 S.E. 2d 310, 312 (1978). If the trial court

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rules that the identification is of independent origin and the findings are supported by competent evidence, they are conclusive on appeal and must be upheld. *State v. Shore, supra*.

Our review of the *voir dire* testimony satisfies us that Judge Rousseau ruled correctly as to the in-court identifications. He conducted an extensive *voir dire* of all three witnesses to determine the basis for their identifications. Massengill testified that he viewed the defendants for ten to fifteen minutes in the motel room the night he was robbed. After the robbery, he described each defendant to the police. Massengill identified defendant Roberts from a group of photographs that were selected based on Massengill's description of the suspect, but was unable to identify Miller with certainty from photographs selected based on his description. On another occasion, Massengill did identify the defendant Miller from a photographic array. However, since Massengill testified that he identified Miller based on his female dress, the trial judge excluded this photographic identification of Miller. The trial court admitted Massengill's in-court identifications of both defendants on the grounds that they both had an independent origin.

The identifications of defendant Roberts by State's witness Linkhous based on the same photographic line-up showed to Massengill and on his in-court identification were properly admitted. Linkhous testified that on the night of the robbery, after hearing a noise followed by a second bang, he went outside and saw the defendant Roberts getting out of a car. Linkhous was between 20 to 30 feet away from Roberts and his view was aided by street lights, a porch light and the defendants' car lights. Whether or not the pretrial photographic array was tainted, the in-court identification clearly had an independent origin and was therefore proper.

Finally, although the photographic line-ups of both defendants shown to Vernon Thurlby, the victim of the South Carolina robbery, were found to be impermissibly suggestive in that the photographs suggested that each of the persons portrayed was being held in jail, the trial court properly found that each of the in-court identifications of the defendants had an independent origin. Thurlby's *voir dire* testimony indicated that he was robbed in a South Carolina motel room by two men, one of whom was

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dressed as a female. During the robbery, Thurlby observed the defendants for an hour and a half, often from short distances. Furthermore, as did witnesses Massengill and Linkhous, Thurlby expressly testified that he based his in-court identifications on the actual viewing of the defendants, not on the photographs shown him. *Cf. State v. Mettrick*, 54 N.C. App. 1, 283 S.E. 2d 139 (1981) (no evidence of independent origin where, among other things, witness never asked if his in-court identification was based upon what he saw at the scene).

[2] Defendants further assert that the trial court erred in denying their motion to sequester witnesses Massengill, Linkhous and Thurlby. Such a motion is addressed to the discretion of the trial court and will not be overturned absent a showing of abuse of discretion. *State v. Cross*, 293 N.C. 296, 299-300, 237 S.E. 2d 734, 737 (1977). We find no abuse of that discretion here. In particular, defendants argue that the witnesses' in-court identifications of the defendants were impermissibly tainted because these witnesses were present when the court asked defendant Miller to raise his hand to identify himself to the jury. Defendants assert that this procedure enabled the witnesses to determine which defendant was Miller and which was Roberts. We disagree. The record shows that the witnesses could only see the backs of the defendants when Miller raised his hand, and Massengill later testified that he did not even recall the incident. *See State v. Fate*, 38 N.C. App. 68, 73, 247 S.E. 2d 310, 313 (1978) (rejecting defendant's contention that robbery victim identified the defendant merely because he was seated next to defense counsel; defendant's contention that a robbery victim comes to court "mentally preconditioned" to identify as robbers whomever might be on trial held without merit). No prejudice therefore inhered from the refusal to sequester.

[3] Defendants next argue that the trial judge committed prejudicial error by granting the State's motions to join for trial both crimes and both defendants, and in denying defendants' motions to sever the same. We hold that the trial court ruled correctly.

The threshold requirement for joinder of offenses is a transactional connection: "Offenses may be joined for trial if they are based on the same act or transaction or arise out of a series of acts or transactions which are connected together or are part of a

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single scheme or plan." *State v. Silva*, 304 N.C. 122, 126, 282 S.E. 2d 449, 452 (1981). *Accord*, *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976) (consolidation proper where offenses of same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other).

In the facts before us, the transactional connection between the robbery and the assault is manifest; however,

[a] mere finding of the transactional connection . . . is not enough. . . . In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of . . . [the] ability to present . . . [a] defense, the charges should not be consolidated.

State v. Silva, supra, at 126, 282 S.E. 2d at 452. The standard by which joinder of two criminal defendants is evaluated is similar to that of joinder of offenses, *see, e.g., State v. Brower*, 289 N.C. 644, 658-9, 224 S.E. 2d 551, 562 (1976) (whether appellant has been deprived of a fair trial by consolidation).

Defendants contend that joinder here denied them a fair trial. As a consequence of the joinder of offenses, defendant Miller claims that he was precluded from testifying about his allegedly passive role in the assault by the likelihood of vigorous examination as to the robbery of Massengill. Both defendants assert that only by the joinder of defendants did testimony concerning their previous encounter with Thurlby in South Carolina become admissible to prove the identity of the persons involved in the shooting of Officer Farlow. They argue that such evidence would not have been admissible if that charge had been tried separately.

We reject defendants' contentions. Evidence concerning the armed robbery was relevant to the issue of the identity of who shot Officer Farlow. The defendants were observed leaving the motel in the same car from which the shooting occurred. Defendant Miller's suggestion that he was somehow precluded from testifying about his passive role in the robbery is irrelevant. Whether a person had an active or passive role in a crime is not

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the standard in this State for liability of persons acting in concert.

The testimony of Vernon Thurlby was relevant to the issue of the identity of the defendants as the perpetrators of both the assault and the robbery. That witness' testimony established that the defendants took from him his Savage Arms .32 caliber pistol when he was robbed. Therefore, the circumstances by which the defendants came into possession of the gun helped establish the identity of the defendants as the persons who shot Officer Farlow. See *State v. Ferree*, 54 N.C. App. 183, 184-5, 282 S.E. 2d 587, 588 (1981) ("[a] defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such design").

Evidence concerning both robberies was admissible regardless of joinder. Exceptions exist to the general rule that evidence concerning the commission of other offenses is not ordinarily admissible. One of these exceptions is applicable to the instant case:

Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify . . . [the accused] as the perpetrator of the crime charged.

State v. McClain, 240 N.C. 171, 175, 81 S.E. 2d 364, 367 (1954). A motion for consolidation is addressed to the discretion of the trial judge and will not be disturbed upon appeal absent an abuse of that discretion, *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981), and we find no such abuse here.

[4] Although the defendants assert that Judge Rousseau erroneously instructed the jury under what amounted to an "attempted felony murder" theory, and that they were prejudiced thereby, we find that the trial court properly instructed the jury concerning the offense of assault with a deadly weapon with intent to kill inflicting serious injury. The gist of defendants' argument is that Judge Rousseau improperly made the armed robbery an additional essential element of the assault with a deadly weapon charge. See *State v. Hill*, 23 N.C. App. 614, 209 S.E. 2d 528 (1974), *aff'd*, 287 N.C. 207, 214 S.E. 2d 67 (1975) (tracing G.S.

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14-32(a) elements of offense). The judge further charged the jury that flight from the scene of the robbery would be a part of the robbery and if either one of the defendants participated in the robbery and was fleeing without a break in the flight and either one shot Officer Farlow, then the jury might conclude that Farlow was shot in the perpetration of the robbery.

The contested element in the judge's instructions on the assault charge was the instruction that to convict, the State must prove beyond a reasonable doubt that the shooting was done in the perpetration of an armed robbery. Under the facts of this case, these instructions were entirely proper in that they correctly instructed the jury on the legal consequences of persons acting in concert to commit a crime.

Where two or more persons "join in a purpose to commit a crime, each of them, *if actually or constructively present*, is not only guilty as a principal if the other commits that particular crime, but . . . [that person] is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

State v. Oliver, 302 N.C. 28, 55, 274 S.E. 2d 183, 200 (1981) (emphasis in original). See also *State v. Small*, 301 N.C. 407, 412-13, 272 S.E. 2d 128, 132 (1980) (principals in the second degree, defined as those who are actually or constructively present at the place and time of the crime and who aid, abet, assist or advise in its commission, are punishable to the same extent as principals in the first degree).

The State's theory at trial was that the defendants, acting in concert, robbed Marvin Massengill and then fled in an automobile they had stolen from Vernon Thurlby three days earlier. This vehicle was stopped by Officer Farlow at the request of Officer Parks. When Farlow approached the driver's side, he was shot in the face. The jury was instructed that if the shooting of Officer Farlow happened during the commission of the armed robbery or during the flight therefrom, and the defendants had acted together in the commission of the robbery, they were both legally accountable for criminal acts occurring during their joint venture. The judge's instructions on the applicable law, then, are fully supported by the facts, and we find no error in them.

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[5] Defendants assign error to the refusal of the trial court to give a requested instruction on interracial identification, *i.e.*, that it is more difficult to identify members of a different race than members of one's own. They cite Chief Judge Bazelon's concurring opinion in *United States v. Telfaire*, 469 F. 2d 552 (D.C. Cir. 1972) as authority for their position. The North Carolina case of *State v. Allen*, 301 N.C. 489, 272 S.E. 2d 116 (1980) governs this issue. In the case before us, as in the *Allen* case, "there is no indication that race in any way affected the identification of defendant by the witnesses," *id.* at 495, 272 S.E. 2d at 120, and this assignment of error is therefore overruled.

[6] Although the defendants cite *State v. Bradley*, 65 N.C. App. 359, 309 S.E. 2d 510 (1983), in support of their position that the trial court erred in denying the defendants' request for a jury instruction concerning the probative force of the fingerprint evidence, we find that case does not control the facts before us. In *Bradley*, the State relied primarily on fingerprint evidence to prove defendants' guilt, and in significant contrast to this case, there was evidence before the jury from which a reasonable inference could have been made that the prints were left by the defendant in circumstances unrelated to the crime. In the case before us, however, the record is devoid of evidence from which the jury could even infer that the prints were left by the defendants at a time or under circumstances not directly related to the crimes charged. In any event, even if defendants were entitled to an instruction on the probative force of the fingerprint evidence, such error would be harmless in that the defendants have not met their burden of showing prejudice, *i.e.*, that a different result would have been reached at trial. *See* G.S. 15A-1443(a). There was substantial evidence connecting defendants to the crimes with which they were charged, and no evidence from which the jury could have concluded the fingerprints were placed under circumstances unrelated to the crimes. This assignment of error is therefore overruled.

No error.

Judges BRASWELL and EAGLES concur.

Green v. Maness

JIMMY BERNARD GREEN, BY HIS GUARDIAN *AD LITEM*, BARBARA ANN GREEN, AND JAMES VERNON GREEN AND WIFE, BARBARA ANN GREEN
v. A. KELLY MANESS, JR.

No. 8218SC944

(Filed 3 July 1984)

1. Judges § 2— special judge— judgment signed out of session

A special judge enjoys the power and authority of a regular judge only during the session of court in that county in which the special judge is duly appointed to hold court, G.S. 7A-45(c), and a judgment signed by a special judge out of session without the consent of the parties is void.

2. Appeal and Error § 26— assignment of error to signing of judgment

Assigning error to the signing of a judgment presents only the question of whether an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form.

3. Judges § 2— special judge— judgment out of session— waiver of objection

Defendant waived objection to a judgment as having been signed by a special judge out of session without his consent when he participated in negotiations concerning the contents of the judgment after the expiration of the session.

4. Physicians, Surgeons, and Allied Professions § 12.1— malpractice action— obstructing trial preparation— sufficiency of evidence

In a medical malpractice action, the evidence supported the trial court's findings that defendant attempted to insulate plaintiffs from medical testimony and to obstruct their trial preparation.

5. Rules of Civil Procedure § 26— deposing expert witness without court order

A doctor who had served as a consulting physician in the treatment of the minor plaintiff and who had supervised the performance of two medical procedures on the child was "an actor or viewer with respect to the transactions or occurrences" upon which plaintiffs based their action and thus could be deposed as an ordinary witness without a court order although defendant had designated the doctor as an expert witness for the defense. G.S. 1A-1, Rule 26(b)(4)(a)(2).

6. Rules of Civil Procedure § 26— right to limit deposition testimony of expert

If defendant had any right to limit the deposition testimony of a doctor whom he had designated as an expert, this right would have been enforceable only by objection during the deposition if plaintiff's counsel had asked questions dealing directly with the doctor's expert opinions rather than with facts known to the doctor.

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7. Rules of Civil Procedure § 26— allowance of further discovery by deposition

The trial court acted within its discretion in allowing further discovery by oral deposition of defendant's expert witnesses where defendant responded to plaintiffs' interrogatories concerning testimony to be given by the experts with the same standardized statement for each of its experts.

8. Rules of Civil Procedure § 37— denial of protective order—allowance of motion to compel discovery—award of expenses

The taxing of court costs, attorney fees and other reasonable expenses against defendant was proper under G.S. 1A-1, Rule 26(c) because defendant's motion to quash a notice of deposition and his motion for a protective order were denied, and the award of expenses was also appropriate under G.S. 1A-1, Rule 37(a)(4) because plaintiffs' motion to compel discovery was allowed.

APPEAL by defendant from *Lane, Judge*. Judgment entered 13 August 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 April 1984.

This is an action for medical malpractice brought against defendant, an obstetrician, for negligent acts and omissions connected with the delivery and birth of minor plaintiff, the second of twins born to plaintiff Barbara Green on 2 August 1974. The complaint alleges that minor plaintiff suffers from permanent brain damage caused by defendant's negligence. This appeal arises out of alleged errors in an order entered during discovery. The original attempt of defendant to appeal this order was dismissed by this Court apparently as a premature appeal from an interlocutory order. At trial the jury returned a verdict for the defendant, and plaintiffs are separately appealing that judgment.

The background events connected with this appeal are as follows: In April 1976, before this action was instituted, plaintiffs' attorneys conferred with Dr. Robert G. Dillard about the Jimmy Green case. Although he was not an attending physician at minor plaintiff's birth, Dr. Dillard, a pediatrician with a subspecialty in neonatology, was called in as a consulting physician several days after the birth. Dr. Dillard examined the child and wrote a report based on his examination, in which he concluded that Jimmy Green had suffered from a lack of oxygen during the delivery process. Dr. Dillard also supervised the performance of two subdural taps on minor plaintiff, a procedure to diagnose the presence or absence of blood in the space beneath the bones of the skull. Dr. Dillard also discussed the delivery with plaintiff

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Barbara Ann Green prior to the minor plaintiff's discharge from the hospital.

After the initial contact with Dr. Dillard, plaintiffs' counsel continued to communicate with him; at one point Dr. Dillard wrote plaintiffs' counsel a letter reiterating his opinion that significant birth asphyxia resulted in the problems subsequently suffered by minor plaintiff. Dr. Dillard recommended that plaintiffs' attorney consult with Dr. John A. Fishburne, an obstetrician associated with the Bowman Gray School of Medicine in Winston-Salem. Plaintiffs' attorney in fact contacted Dr. Fishburne on a fee basis, showing him the pertinent medical records and discussing plaintiffs' case with him.

This lawsuit was filed 3 December 1979. The developments leading up to the entry of Judge Lane's order are best summarized chronologically:

27 December 1979: Defendant serves interrogatories on plaintiffs.

15 January 1980: Defendant's attorney contacts Dr. Dillard about the possibility of serving as expert witness for the defense.

29 January 1980: Meeting held at Forsyth Memorial Hospital in Winston-Salem. Counsel for defendant, Dr. Dillard, Dr. Fishburne, and others attend this meeting. Dr. Dillard agrees to serve as expert witness for defense.

30 January 1980: Plaintiffs answer defendant's interrogatories. Plaintiffs list neither Dr. Dillard nor Dr. Fishburne as an expert witness.

4 February 1980: Plaintiffs serve interrogatories on defendant.

25 February 1980: Defendant answers plaintiffs' interrogatories. Both Dr. Dillard and Dr. Fishburne are listed as expert witnesses.

4 April 1980: Plaintiffs file notice to take deposition of Dr. Dillard.

4 April 1980: Defendant files "Motion to Quash Notice of Deposition and Motion for a Protective Order."

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5 May 1980: Plaintiffs file "Motion to Compel Discovery and to Authorize Plaintiffs to Depose Persons Listed by Defendants as 'Experts' without Expense to Plaintiffs."

A hearing on defendant's motion to quash and plaintiffs' motion to compel was held on 19 June 1980. (Although the transcript of the hearing indicates other motions of the parties were originally involved, these motions were apparently resolved by the parties and are not treated in Judge Lane's order.) From the order resulting from the hearing, defendant appeals.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Joseph E. Elrod, III, for defendant appellant.

Clark & Wharton, by David M. Clark, for plaintiff appellees.

VAUGHN, Chief Judge.

[1] Defendant first argues that Judge Lane's order is void because it was signed out-of-session over defendant's objection. Judge Lane presided as a special judge over a one-week civil session of Guilford County Superior Court, beginning 16 June 1980. The hearing in this case was held on 19 June 1980, and the order was not signed until 13 August 1980 and filed the following day. It is true that a special judge enjoys the power and authority of a regular judge only during the session of court in that county in which the special judge is duly appointed to hold court, G.S. 7A-45(c), and that a judgment signed by a special judge out-of-session without the consent of the parties is void. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 716, 220 S.E. 2d 806, 810 (1975), *review denied*, 289 N.C. 619, 223 S.E. 2d 396 (1976). However, to the extent defendant preserved his right to argue the question on appeal of whether the judgment was validly signed out-of-session, we find no error.

Rule 10 of the North Carolina Rules of Appellate Procedure governs the scope of review on appeal. In order to preserve a question for this Court's consideration, the appellant must make properly taken exceptions the basis of an assignment of error. Rule 10, N.C. Rules App. Proc. The assignment of error upon which defendant bases his argument that Judge Lane's order was signed out-of-session or otherwise without authority states: "The trial court erred in granting the plaintiffs' motion to compel

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discovery and in signing and entering the order granting plaintiffs' motion."

[2] Assigning error to the signing of a judgment presents only the question of whether an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form. *Church v. Church*, 27 N.C. App. 127, 218 S.E. 2d 223, cert. denied, 288 N.C. 730, 220 S.E. 2d 350 (1975). *Accord, State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978) (court review for this type of assignment of error limited to consideration of the record proper). The record before this Court contains no evidence that the order was signed out-of-session without the consent of the parties.

[3] We note, however, that even if defendant's assignment of error had been more specifically framed to reflect his position that the judgment was signed out-of-session and without consent, enabling us to consider all materials before us and not just the record proper, defendant still would not prevail. Although defendant objected at the hearing to the judgment being signed out-of-session, defendant subsequently participated in negotiations surrounding the contents of the judgment after the expiration of the session without further objection. In particular, defendant sent a letter dated 25 June 1980 to Judge Lane, discussing the contents of a proposed order tendered by plaintiffs' attorney and also urging the trial court to reconsider its award of expenses. By this action defendant waived any objection he might have made to the judgment being signed out-of-session. We hold that under the circumstances, the order signed on 13 August 1980 by Judge Lane was valid.

[4] Defendant next assigns error to several related findings of fact in Judge Lane's order, namely, the finding that defendant generally attempted to insulate plaintiffs from medical testimony and obstruct their trial preparation, and findings that defendant sought to insulate the plaintiffs from medical testimony by employing Dr. Dillard and Dr. Fishburne as expert witnesses. Defendant supports this assignment of error simply by asserting that no evidence supports the trial court's findings. We disagree.

The evidence adduced at the hearing showed that Dr. Dillard had served as a consulting physician on minor plaintiff's case. He supervised two medical procedures on the child. He spoke with

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the mother. This involvement with the case enabled Dr. Dillard to form an opinion that the minor plaintiff had suffered from a lack of oxygen during labor, an opinion highly relevant to the outcome of the case. Plaintiffs' attorney personally consulted with Dr. Dillard concerning the case, and also consulted with him by telephone a number of times thereafter. Unlike Dr. Dillard, Dr. Fishburne did not directly participate in the case. However, plaintiffs employed Dr. Fishburne on a fee basis prior to filing this action, having Dr. Fishburne review pertinent records and discussing these records with him.

Despite Dr. Dillard's involvement with the case, and the contact both doctors had with the plaintiffs, defendant subsequently contacted both physicians, discussed the case with them, and requested their services as expert witnesses for the defense. The doctors agreed to serve as witnesses, and defendant listed both doctors as expert witnesses in response to plaintiffs' interrogatories.

Thereafter, plaintiffs subpoenaed Dr. Dillard to appear at a deposition. Had defendant not listed Dr. Dillard as an expert witness, there would have been no grounds for defendant to object to the taking of his deposition, given his involvement with the case as a treating physician. *See* Rule 30(a), N.C. Rules Civ. Proc. However, based on their engagement of Drs. Dillard and Fishburne to serve as expert witnesses, defendant promptly moved to quash the notice of deposition absent a court order. Defendant's counsel simultaneously sent a letter to plaintiffs' counsel advising him that a formal complaint against him would be filed with the North Carolina State Bar if he did not refrain from communicating with defendant's expert witnesses. Based on these facts, we cannot say that Judge Lane abused his discretion in the findings of fact related to defendant's attempt to insulate plaintiffs from medical testimony and obstruct their trial preparation. *See Travel Agency, Inc. v. Dunn*, 20 N.C. App. 706, 202 S.E. 2d 812, *cert. denied*, 285 N.C. 237, 204 S.E. 2d 23 (1974) (trial court acts within its discretion in making and refusing discovery orders).

Defendant further contends that the lower court erred in ruling that plaintiffs might consult, depose and subpoena Drs. Dillard and Fishburne as any other witnesses, and also erred in

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allowing further discovery of defendant's expert witnesses upon oral deposition. Defendant bases these contentions upon an alleged failure of plaintiffs to comply with the discovery procedures contained in the North Carolina Rules of Civil Procedure. We hold that plaintiffs complied with all pertinent discovery procedures, and that the lower court committed no error in its findings of fact and conclusions of law relating to these discovery procedures.

[5] Defendant argues that because he designated Dr. Dillard as an expert witness, the plaintiffs were not permitted to notice Dr. Dillard's deposition without first obtaining a court order pursuant to Rule 26(b)(4)(a)(2). This argument is without merit. Defendant correctly states that Rule 26 provides the exclusive means of discovering facts and opinions held by experts, and the sequence in which discovery is to be made, first by interrogatories and then if discovery is sought by means other than interrogatories, by court order.

The circumstances in this case, however, obviated the need for plaintiffs to obtain a court order before the deposition of Dr. Dillard could be taken. The official comment to Rule 26(b)(4) states that "the subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because . . . [that expert] was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness." Dr. Dillard's role in the Jimmy Green case made him "an actor or viewer with respect to the transactions or occurrences" upon which plaintiffs based this action. Dr. Dillard is therefore to be treated as an ordinary witness, and such a witness may be deposed without a court order. *See generally*, Rule 30, N.C. Rules Civ. Proc.

The case of *Nelco Corp. v. Slater Elec. Inc.*, 80 F.R.D. 411 (E.D.N.Y. 1978) presents an analogous situation, where a deponent was both a fact witness and an expert witness. A United States District Court held that such a witness could be deposed as to the facts known to that witness upon proper notice but would not be required to respond to questions involving his or her expert opinion. Only if the deposing party sought to elicit the witness's expert testimony would a court order be required pursuant to Rule 26(b)(4). The court observed:

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[R]eason dictates that the mere designation by a party of a trial witness as an "expert" does not thereby transmute the experience that the expert witness acquired as an actor into experience . . . acquired in anticipation of litigation or for trial.

Id. at 414.

[6] Consequently, if defendant had any right to limit Dr. Dillard's testimony, this right would only have been enforceable by objection during the deposition if plaintiffs' counsel had asked questions dealing directly with Dr. Dillard's expert opinions regarding the birth of the minor plaintiff. Defendant had no right to oppose the taking of Dr. Dillard's deposition altogether.

We also find no error in those parts of the order that allow further discovery by oral deposition of Dr. Fishburne and defendant's other expert witnesses. Again, defendant premises his argument on alleged procedural violations by plaintiffs. Plaintiffs expressly proceeded by a Rule 26(b)(4)(a)(2) motion entitled "Motion to Compel Discovery and to Authorize Plaintiffs to Depose Persons Listed as 'Experts' Without Expense to Plaintiffs." As already stated, Rule 26(b)(4) requires a party to seek a court order to secure information from the opposition's expert witnesses other than by interrogatories. Plaintiffs' motion was an effort to obtain such a court order, and therefore proper procedure was followed.

[7] Furthermore, there was substantive justification for the court's allowance of further discovery. In response to plaintiffs' interrogatories concerning the facts and opinions to which each of defendant's experts would testify, and the grounds therefore, defendant responded with the same standardized statement for each of its expert witnesses. This standardized statement was largely a disclaimer of defendant's negligence. Although defendant's answers were arguably legally adequate, *see Wilson v. Resnick*, 51 F.R.D. 510 (E.D. Pa. 1970), Rule 26(b)(4)(a)(2) gives a judge discretion to allow further discovery from expert witnesses in addition to interrogatories. Given defendant's superficial, if not unresponsive, answers, and the general philosophy of the Rules of Civil Procedure, *see discussion infra*, the court acted within its discretion in permitting further discovery.

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[8] The taxing of court costs, attorney's fees, and other reasonable expenses against the defendant was also proper. Those portions of the order already discussed effectively overruled defendant's motion to quash and for a protective order, and partially granted plaintiffs' motion to compel discovery. Judge Lane therefore had the authority to impose sanctions pursuant to Rule 26(c) and Rule 37(a)(4). Rule 26(c) allows an award of expenses in the event a motion for a protective order is denied. Rule 37(a)(4) allows the court to require the party whose conduct necessitated the bringing of a motion to compel to pay expenses to the prevailing party. Thus, the award of expenses in this case is appropriate both under Rule 26(c) and Rule 37(a)(4). The award is justified under Rule 26(c) because defendant's motion to quash was denied; it is justified under Rule 37(a)(4) because plaintiffs' motion to compel was granted.

In conclusion, we echo the lower court in questioning the propriety of the defendant's engaging Dr. Dillard and Dr. Fishburne as expert witnesses, given their involvement with the plaintiffs' case. The conduct of defendant through his counsel connected with the selection of the doctors as expert witnesses thwarted plaintiffs' legitimate trial preparation. The unsatisfactory answers to plaintiffs' interrogatories concerning the substance and basis for expert testimony further hindered such trial preparation.

The philosophy underlying the North Carolina Rules of Civil Procedure is discussed by Shuford in his work on that subject. Relying on a number of cases and commentators, the author states:

Procedure is only the means to an end—justice—and not an end in itself "The fundamental premise of the federal rules is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two gladiators with surprise and technicalities as their chief weapons" "[I]f the rules are to be effective tools for trial or other disposition of cases, a general attitude of liberal construction must prevail."

W. Shuford, N.C. Civil Practice and Procedure § 1-3 (2d ed. 1981). See *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E. 2d 885, 888, review denied, 297 N.C. 304, 254 S.E. 2d 921 (1979)

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(discovery rules to be construed liberally so as to substantially accomplish their purposes).

Defendant's actions, characterized by a reliance on "surprise and technicalities," were contrary to that which the Rules of Civil Procedure were designed to achieve. *See, e.g., Telegraph Co. v. Griffin, supra* (a primary purpose of discovery rules is to facilitate disclosure of relevant and material information to permit narrowing and sharpening of basic issues and facts). Judge Lane's order sought to remedy the improprieties committed by defendant, and promote the search for truth and justice in the case by a flexible yet fair construction of the rules. The order is proper in all respects. *See Hudson v. Hudson*, 34 N.C. App. 144, 237 S.E. 2d 479, *review denied*, 293 N.C. 589, 239 S.E. 2d 264 (1977) (orders concerning discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion).

Affirmed.

Judges WHICHARD and PHILLIPS concur.

M. G. THOMAS v. W. H. RAY, JR., BANKINGPORT, INC., AND GREAT AMERICAN INSURANCE COMPANY

No. 8311SC911

(Filed 3 July 1984)

Estoppel § 4.5— insurance on vehicle—nonpayment of premiums—plaintiff's knowledge—no estoppel of insurance company and agent

Where plaintiff agreed to sell a house to a third party in exchange for certain consideration, including a Cadillac upon which the third party agreed to maintain insurance coverage, the third party obtained a renewal collision policy through defendant but never paid the premium despite notice of cancellation, plaintiff was driving the automobile when it was involved in an accident and sustained damage, the third party asked defendant about payment of the damage to the vehicle under the policy but was told there was no coverage because of nonpayment of premiums, at the time plaintiff and the third party closed their car-house deal plaintiff placed the balance of the purchase price of the vehicle in escrow to be paid over to the third party upon acknowledgment by the insurance company that the claim would be paid, defendant sent a letter to the seller of the vehicle stating that the insurance

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company would pay the claim, plaintiff then authorized release of the funds in escrow to the third party, and the insurance company thereafter refused to pay the claim on the basis that its only obligation was to the lienholder who had been paid in full from the escrow funds, plaintiff was precluded as a matter of law from asserting estoppel against defendants, since plaintiff's insistence that the balance of the purchase price of the car be placed in escrow pending resolution of the claim was convincing evidence that plaintiff was fully aware that there was a serious problem with the insurance coverage; he was therefore on notice at least to inquire as to the reasons for non-coverage; his failure to make such inquiry and to tender any portion of the premium, both established by the uncontradicted record, constituted contributory negligence as a matter of law; plaintiff ratified the third party's nonpayment of the insurance premiums by going forward with the car-house deal at the original price; and the defects in the car itself and the worthlessness of the third party's insurance were known to him, actually or constructively. Furthermore, where plaintiff, without inquiry and in the face of repeated denials of coverage as to the policyholder through whom he claimed, volunteered payment to a third party to whom he had no legal obligation based on a letter between defendant and another party, plaintiff was barred by his own negligence as a matter of law from relying on the letter to raise an estoppel against defendants.

APPEAL by plaintiff from *Smith, Judge*. Judgment entered 7 April 1983 in Superior Court, LEE County. Heard in the Court of Appeals 11 May 1984.

J. Douglas Moretz, P.A., for plaintiff appellant.

Patterson, Diltney, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr., and Theodore B. Smyth, for defendant appellees.

BECTON, Judge.

Plaintiff appeals from summary judgment against him, which denied his claim that defendants were estopped to deny coverage under an automobile collision policy. We hold that plaintiff could not assert estoppel, and we affirm.

I

The facts of the case, although not really in dispute, are rather complicated. We have arranged them chronologically as follows:

1. In July 1979, Roy Herring purchased a new Cadillac from Doug Wilkinson of Wilkinson Cadillac-Oldsmobile (Wilkinson) for

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approximately \$18,000.00. Financing was through General Motors Acceptance Corporation (GMAC), which received the installment contract by assignment from Wilkinson. Wilkinson had a repurchase obligation in the event of Herring's default, and GMAC had recourse against Wilkinson.

2. In 1980, Herring's insurance agent, William Ray of Bank-
ingport, Inc., transferred the collision coverage on the Cadillac to
Great American Insurance Company (GAIC).

3. In January 1981, Herring and M. G. Thomas orally agreed
that Thomas would sell Herring a house. Herring would assume
the mortgage on the house, and, in exchange, Thomas would
receive cash and the Cadillac. Herring allowed Thomas to use the
Cadillac prior to closing, with the provision that Herring would
meet the payments and keep up insurance coverage.

4. In February 1981, Herring, through Ray, obtained a re-
newal collision policy with GAIC effective until August 1981. Her-
ring did not pay any premium at this time.

5. On 10 March 1981, GAIC notified Herring that he had to
pay his premium by 28 March 1981 to "continue" insurance pro-
tection.

6. On 30 March 1981, having received a check from Herring,
GAIC rescinded its notice of cancellation, stating that the in-
surance continued in effect.

7. On 27 April 1981, GAIC prepared a "reversal notice,"
which informed Herring that his check had been returned for in-
sufficient funds. The notice demanded payment of premium by 15
May 1981 to "continue" coverage. The record is unclear when
Herring received the notice.

8. On 29 April 1981, Thomas was driving the Cadillac when it
left the road in a curve and rolled over into an open field. The
Cadillac sustained about \$8,000 worth of damage; no other cars
were involved and no other injury to persons or property oc-
curred.

9. Shortly after the accident Herring asked about payment of
the damage to the Cadillac under the GAIC policy. Ray said there
was no coverage because of nonpayment of premiums.

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10. Thereafter, on 19 May 1981, a final notice of cancellation was issued by GAIC.

11. Also on 19 May 1981, Thomas and Herring closed their deal. Thomas took title to the Cadillac. Herring still owed GMAC \$12,763.18, and Thomas placed that amount in escrow, to be paid over to Herring upon acknowledgment by GAIC that the claim would be paid. Herring ceased making payments on the Cadillac at about this time.

12. Ray discussed the claim with GAIC. In addition, Wilkinson, who under the original sale contract was obligated to buy the Cadillac if the loan was not paid, began inquiring of Ray and Herring if GAIC would honor the claim.

13. On 17 June 1981 Ray wrote to Wilkinson and Herring informing them that there was no coverage.

14. On 14 July 1981, after further discussions with GAIC, GMAC, Wilkinson and Herring, Ray sent the following letter to Wilkinson:

Re: Roy Herring Claim

Dear Doug [Wilkinson]:

Per our phone conversation this date, this letter is to inform you that Great American Insurance Company is going to honor the above claim.

If I can be of any other help, please let me know.

15. Wilkinson informed Herring, who got a copy of the letter and took it to Thomas. Thomas authorized release of the \$12,763.18 from escrow. The escrow agent issued a check in that amount jointly to Herring and GMAC; Herring delivered the check to Wilkinson, who forwarded it to GMAC which negotiated the check.

16. GAIC thereafter refused to pay the claim, on the basis that its obligation lay only to the lienholder, GMAC. Since GMAC had received payment in full, that obligation was extinguished and GAIC refused to pay.

17. Thomas thereupon brought the present action against GAIC, Ray, and Bankingport, Inc., Ray's agency, to recover the

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amount of the unpaid claim, as well as treble damages for unfair and deceptive trade practices. Neither Herring, GMAC nor Wilkinson was made a defendant. From summary judgment against him on all claims, Thomas appeals.

II

This appeal presents one major issue: was Thomas unable, as a matter of law, to assert estoppel against defendants? Thomas argues that summary judgment was inappropriate, contending that the evidence raised a genuine issue of fact as to his justifiable reliance on the 14 July 1981 letter. Therefore, Thomas argues, the applicability of equitable estoppel, requiring defendants to honor the claim, must be resolved by a jury. Defendants, on the other hand, argue that Thomas' own negligence as a matter of law precludes him from proceeding on an estoppel theory.

A

In a case such as this, summary judgment is appropriate when the defendants as the moving parties establish the absence of any genuine issue of fact as to a complete defense to the opponent's claim. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Ballinger v. Dept. of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982). *disc. rev. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). If the factual evidence, taken in the light most favorable to the non-movant, allows no inferences inconsistent with the defense, the movant has satisfied his burden, and summary judgment in its favor will be affirmed. *Id.* This is true even when the facts raise difficult questions of law. *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

B

Our Supreme Court has authoritatively set forth the elements of an equitable estoppel:

[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the

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other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins v. M & J Finance Corp., 238 N.C. 174, 177-78, 77 S.E. 2d 669, 672 (1953). The element of lack of knowledge and means of knowledge on the part of the party asserting estoppel imports principles of negligence, and hence contributory negligence, into its application. Absent some fraud, estoppel is not available to protect a party against the consequences of his own negligence. *Wachovia Bank & Trust Co. v. Wayne Finance Co.*, 262 N.C. 711, 138 S.E. 2d 481 (1964); *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955). For the following reasons, we conclude that summary judgment was proper, since Thomas' own negligence as a matter of law precluded him from successfully asserting estoppel.

C

The uncontradicted record discloses that neither Herring nor Thomas ever paid a single penny in premiums to GAIC under the renewal policy. Giving a worthless check does not constitute payment. *Cauley v. Gen'l American Life Ins. Co.*, 219 N.C. 398, 14 S.E. 2d 39 (1941). Unless payment of the premium is waived, it is a condition precedent to coverage. *Engelberg v. Home Ins. Co.*, 251 N.C. 166, 110 S.E. 2d 818 (1959) (per curiam) (payment by agent does not constitute payment by insured). And nonpayment of premium when due, or within the period of grace thereafter, has repeatedly been held to automatically avoid the policy. *Allen v. Nat'l Accident & Health Ins. Co.*, 215 N.C. 70, 1 S.E. 2d 94 (1938). This is true for the simple reason that insurance companies are businesses, and they rely on premiums for their existence. *See Hay v. Ass'n*, 143 N.C. 256, 55 S.E. 623 (1906).

We are aware that insurance companies have wrongfully denied coverage in some cases in which bad faith or careless business practices might reasonably be imputed to them. *See e.g.*,

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Gaston-Lincoln Transit, Inc. v. Maryland Cas. Co., 285 N.C. 541, 206 S.E. 2d 155 (1974) (company estopped to deny coverage when it attached limiting rider without notifying insured). Here, however, the insurance company allowed Herring substantial latitude in making his payments. Having received no premium two weeks after issuance, GAIC indicated it would still continue coverage if Herring paid within 18 days. It rescinded the notice of cancellation upon receipt of Herring's check. Four weeks later, when Herring's check bounced, GAIC still was willing to continue coverage upon receipt of certified payment in 18 days. By the same notice GAIC warned Herring that the law imposed a duty upon him to maintain financial responsibility coverage. Even *after* the accident on 29 April 1981 had resulted in thousands of dollars in damage to the Cadillac, payment of only \$197 by 15 May 1981 would have assured coverage for that damage, but neither Herring nor Thomas ever paid GAIC anything. Only after almost three months did GAIC finally cancel the policy. No bad faith or careless practice is apparent in this conduct by GAIC; if anything, GAIC made an extra effort to protect and serve a customer whose conduct indicated an obvious business risk.

Clearly, then, Herring had no coverage under the policy itself, and Thomas cannot now claim that any reliance on his part on the terms thereof was justified. His insistence that the money be placed in escrow pending resolution of the claim is convincing evidence that Thomas was fully aware that there was a serious problem with the insurance coverage. And accordingly, he was on notice at least to inquire as to the reasons for non-coverage, even if he did not actually know that Herring had never paid any premium. His failure to make any such inquiry and to tender any portion of the premium, both established by the uncontradicted record, constituted contributory negligence as a matter of law barring recovery on estoppel under the policy.

D

The house-car deal was first made in January 1981, as part of which Herring agreed to maintain collision coverage on the Cadillac. Herring failed to perform this part of the oral agreement. Notwithstanding this breach, and notwithstanding the fact that Thomas knew or should have known of it, Thomas went ahead and agreed to pay Herring the full value of the Cadillac. Although

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the accident occurred some three weeks before the closing, Thomas did not obtain in the interim (or subsequently) any appraisal of the actual damage to the automobile. He did not seek any reduction in the purchase price as a result of Herring's breach. The reason for this failure does not appear from the record. If there was some legal reason for paying the full price for the Cadillac, it was incumbent upon Thomas to forecast some evidence thereof; he did not do so. Instead, his brief indicates that he "felt obligated" to go through with the deal; that, however, does not justify equitable relief, particularly against GAIC, a third party.

Traditional equitable principles support this result, in particular the maxim that courts of equity aid those who are diligent, not those who are negligent or sleep on their rights. *W. B. Coppersmith & Sons, Inc. v. Aetna Ins. Co.*, 222 N.C. 14, 21 S.E. 2d 838 (1942). Like plaintiffs in *Coppersmith*, Thomas was an experienced businessman and the law will accordingly require him to exercise *some* reasonable diligence and prudence to protect his rights. The courts of equity in North Carolina have consistently refused to aid parties who complain of fraud or other irregularity in a disadvantageous bargain which they have ratified subsequent to discovery of the irregularity. *Brown v. Osteen*, 197 N.C. 305, 148 S.E. 434 (1929) (ratified fraud); *Moore v. Reed*, 37 N.C. (2 Ired. Eq.) 580 (1843) (drunk at time of contract, ratified when sober); *Ridings v. Ridings*, 55 N.C. App. 630, 286 S.E. 2d 614, *disc. rev. denied*, 305 N.C. 586, 292 S.E. 2d 571 (1982) (subsequent payment of alimony ratified contract allegedly signed under undue influence). Here, Thomas ratified Herring's nonpayment of the insurance premiums by going forward with the deal at the original price. The defects in the Cadillac itself and the worthlessness of Herring's insurance were known to him, actually or constructively. Having made this bargain, despite knowledge of Herring's breach and circumstances rendering the bargain much less valuable than it was originally, Thomas cannot now claim equitable relief. His own indifference to the consequences precludes such a claim.

III

Therefore, unless defendants were estopped by the letter of 14 July 1981, Thomas had no rights and summary judgment was

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appropriate. Final notice of cancellation was prepared by GAIC on 19 May 1981 and Ray wrote to Wilkinson and Herring on 17 June 1981 informing them that there was no coverage. The contract of insurance between Herring and GAIC had therefore clearly terminated well before 14 July 1981. The legal rights of the various parties at that time were as follows: Herring had the house; Thomas had the Cadillac; and Thomas had placed the contract value of the Cadillac in escrow pending the resolution of the claim. Wilkinson had an obligation to pay off GMAC if Herring defaulted on the payments, for which Herring was still legally obligated. Any payment by GAIC would, under Herring's policy, go to GMAC as first lienholder. Therefore, Wilkinson had an interest in seeing that GAIC reduced his liability by paying the Herring claim. Absent from this recital is any obligation on Thomas' part to do anything other than honor his contract with Herring. No evidence appears, nor did Thomas forecast any, which would indicate any obligation on his part to pay Wilkinson or GMAC. To the extent that Thomas agreed to pay anything, that agreement could only have been between himself and Herring.

Nevertheless, when Herring received the letter from Wilkinson and showed it to Thomas, Thomas authorized release of the payment to Herring and GMAC. Obviously, as subsequently occurred, the payment was for the benefit of GMAC. See 2 R. Anderson, *Uniform Commercial Code* § 3-116:6 (2d ed. 1971) (effect of prior agreement on note to joint payees). Thomas admitted that he knew that that was the purpose of the payment at the time he released the money. The letter authorizing release directs payment to GMAC, not Herring. Thomas had no obligation to pay GMAC; he simply "presumed" that he would be reimbursed. He advanced no reason for this presumption, made in the face of repeated denials of coverage by GAIC to Herring, and based on a letter to a third party, Wilkinson. Thomas never inquired further of Ray, Wilkinson, or GMAC as to what the letter meant, or how and to what extent he would be reimbursed. As the complaint shows on its face, he could only expect reimbursement on the damages payable under the policy. It is clear that such reimbursement would occur, if at all, by subrogation to Herring. Herring did not have, nor has he ever asserted, any right to payment from GAIC or GMAC. It is firmly established that "[a] party can ac-

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quire no better right by subrogation than that of the principal." *Dowdy v. Southern Ry. Co.*, 237 N.C. 519, 525, 75 S.E. 2d 639, 643 (1953); *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 266 S.E. 2d 18, *disc. rev. denied*, 301 N.C. 86 (1980). Therefore, Thomas had no right to subrogation against GAIC.

We conclude that Thomas is barred by his own negligence as a matter of law from relying on the letter to raise an estoppel against defendants. Without inquiry and in the face of repeated denials of coverage as to the policyholder through whom he claimed, he volunteered payment to a third party to whom he had no legal obligation, based on a letter between yet two more parties. On these facts, summary judgment was appropriate.

IV

We therefore hold that Thomas has shown no right to relief and that the trial court properly granted summary judgment to these defendants. This ruling appears harsh, but it is the unfortunate result of a consistent pattern of inattention and neglect. We note that the unfair windfall in this case really accrued to Herring, whom Thomas, acting at Herring's instigation, relieved of the likely responsibility for bearing the collision loss to the Cadillac. Since Thomas elected not to join Herring as a defendant, however, we are powerless to alter this sad state of affairs on appeal. The order appealed from is accordingly

Affirmed.

Judges WELLS and JOHNSON concur.

CLAUDINE JOHNSON GATES (SPEISER) v. ROY LEE GATES

No. 8322DC826

(Filed 3 July 1984)

- 1. Appeal and Error § 14; Rules of Civil Procedure § 58— entry of judgment—no sum certain—no direction by trial judge—appeal timely**

The trial court's order requiring defendant to resume child support payments until the child reached 21, married, died or became self-supporting was not for a sum certain, and entry of judgment therefore depended on the

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direction of the trial judge pursuant to G.S. 1A-1, Rule 58; however, where no direction appeared in the record, but at a hearing on plaintiff's original motion to dismiss defendant's appeal the trial judge ruled that he did not direct entry of judgment on 13 January 1983 and that judgment therefore did not become effective until the written order of 21 January 1983, and the trial judge ordered the erroneous entry stricken under G.S. 1A-1, Rule 60(a), then judgment was in fact entered on 21 January and defendant's motion to amend the findings of fact on 31 January was timely, thus preserving his right to appeal.

2. Divorce and Alimony § 24.10— child support—age of emancipation changed—obligation terminated

Where defendant's 1964 confession of judgment provided for child support until the age of 21 or until the youngest child "should become self-supporting [or] marry" and further stated defendant's desire to provide for his minor children until they became of legal age, and the age of majority was changed in 1971, the terms of the confession of judgment obligated defendant to pay only until the youngest child reached 18, not 21.

3. Divorce and Alimony § 24.4— child support—unilateral reduction improper—defendant in contempt

Defendant could not unilaterally reduce child support payments because of the remarriage of plaintiff and majority of one of the children but instead should have applied to the trial court for relief, and failure to do so amounted to contempt.

4. Divorce and Alimony § 27— attorney's fees—insufficiency of findings

The trial court's finding describing in general terms what services plaintiff's attorney had rendered was insufficient to support an award of \$600 for attorney's fees in a child support case.

Judge WELLS dissenting.

APPEAL by defendant and cross appeal by plaintiff from *Fuller, Judge*. Order entered 21 January 1983 in District Court, DAVIDSON County. Heard in the Court of Appeals 4 May 1984.

Brinkley, Walser, McGirt, Miller & Smith, by Stephen W. Coles and Charles H. McGirt, for defendant appellant.

J. Calvin Cunningham and Charles E. Frye, III for plaintiff appellee.

BECTON, Judge.

A father who unilaterally reduced support payments appeals from an order directing resumption of payments and payment of arrears and attorney's fees. Because of an error of law in computing the arrears, we remand.

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I

Defendant father, Roy Gates, and plaintiff mother, Claudine Gates, now Speiser, separated in 1964. They had two children: Richard, born 29 June 1954, and Mary Robin, born 13 April 1963. On 29 April 1964 the father signed a confession of judgment which contained the following provision:

Roy Lee Gates the defendant . . . does hereby confess judgment in favor of the plaintiff . . . for payments to her for alimony and separate maintenance for herself and for subsistence, support and maintenance of the minor children of their marriage . . . in the following manner and amounts: \$30.00 on the 4th day of May, 1964, and a like amount of \$30.00 on Monday of each succeeding week thereafter until all and each of the following events shall have occurred:

- (1) The youngest of the aforesaid children shall reach the age of 21 years or should become self-supporting, marry, or die prior to reaching 21 years of age.
- (2) The said wife shall die or remarry.

The confession of judgment stated the father's desire "to provide alimony for his said wife, until her death or re-marriage and to provide for the support and maintenance of the minor children of the said marriage, . . . until they become of legal age."

In an Order entered 25 May 1970 the trial court found that the existing level of support was inadequate, and ordered the father to pay an additional \$15 per week in child support, bringing the total to \$45 per week. In 1974, the mother remarried. Without obtaining a court order, the father thereupon reduced the payments by two-thirds because of the remarriage and because the son had reached 18 and become self-supporting. The son was 20 at the time. The father ceased payments altogether when the daughter graduated from high school at the age of 18 in June 1981.

On 15 October 1982 the mother filed a motion asking that the father show cause why he should not be held in contempt for failure to comply with the court amended confession of judgment. After an evidentiary hearing, the trial court found the father in willful contempt and ordered him to pay \$13,500 in arrears and

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\$600 in attorney's fees, and to resume regular payments of \$45 per week. This Order, filed 21 January 1983, is the subject of the father's appeal. The mother cross appeals from a later Order denying her motion to dismiss the father's appeal.

II

[1] We first address the mother's cross appeal, as well as her motion to dismiss filed with this Court; both seek dismissal of the father's appeal. The trial judge announced his decision in open court on 13 January 1983 and directed the mother's attorney to prepare a written order. The Order, filed 21 January 1983, directed the father to pay \$13,500 in arrears and \$600 in attorney's fees, and to resume regular payments of \$45 per week. On 31 January 1983 the father filed a motion to amend the findings of fact pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b) (1983). That motion was denied 7 March 1983, and the father filed notice of appeal the same day. Contending that the Order was entered 13 January 1983, the mother moved to dismiss in the trial court for failure to give timely notice of appeal. The trial court denied the motion, which the mother renews here; her cross appeal raises the same issues.

Since Rule 52(b) allows motions to amend findings within 10 days of entry of judgment, and since such a motion tolls the running of the period for giving notice of appeal, 4A N.C. Gen. Stat. App. I(2A), N.C. R. App. P. 3(c)(ii) (Supp. 1983), the decisive question is whether judgment was entered 13 January or 21 January 1983. If the clerk's notation of the trial court's oral order of 13 January constituted entry of judgment, the Rule 52(b) motion was not timely and the father's appeal is subject to dismissal. If, on the other hand, judgment was not entered until the filing of the written order on 21 January 1983, the Rule 52(b) motion was timely and the father has preserved his right to appeal. Determination of this question requires application of N.C. Gen. Stat. § 1A-1, Rule 58 (1983), which provides in pertinent part:

Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover *only a sum certain or costs or that all relief shall be denied* or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall

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constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes *as the judge may direct* and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing. [Emphasis added.]

The trial court's judgment required the payment of arrears and attorney's fees totalling \$14,100 and payment of \$45 per week until all the conditions in the confession for judgment were met. This entailed payment until Robin Gates reached 21, died, married or became self-supporting before reaching 21. None of these conditions obtained at the time of the order, when Robin Gates was not yet 21. She could die, marry, or become self-supporting before reaching that age, and therefore the amount due remained indefinite. We therefore hold that the judgment was not for a "sum certain." See Black's Law Dictionary 1287 (5th ed. 1979); N.C. Gen. Stat. § 25-3-106 (1965); *Id.* official comment; *Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980). Therefore the first paragraph of Rule 58 did not apply. Entry of judgment depended instead on the direction of the trial judge under the second paragraph. In the present case, no direction appears in the record. At a hearing on the mother's original motion to dismiss the father's appeal, the trial judge ruled that he did not direct entry of judgment on 13 January 1983 and that judgment therefore did not become effective until the written order of 21 January 1983. The trial judge ordered the erroneous entry stricken under N.C. Gen. Stat. § 1A-1, Rule 60(a) (1983).

Unfortunately, the cases do not provide us with clear guidance as to the validity of the trial judge's action in the case *sub judice*. The inattention of the trial bench to the directory mandate of the second paragraph of Rule 58 has resulted in conflicting decisions on the dismissal of appeals for failure to give timely notice following entry of judgment. In *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E. 2d 272, *disc. rev. denied and appeal dismissed*, 293 N.C. 740, 241 S.E. 2d 513 (1977), we upheld a ruling denying dismissal of the appeal when the trial judge subsequently

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ruled that he did not intend to direct judgment in his oral order, even though the order effectively denied all relief. In *Byrd v. Byrd*, 51 N.C. App. 707, 277 S.E. 2d 472 (1981), on the other hand, we upheld a dismissal even though the relief granted was complex and no specific direction appeared in the record. See also *Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975) (similar facts). But in *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *disc. rev. denied*, 289 N.C. 619, 223 S.E. 2d 396 (1976), the absence of any actual direction to enter judgment was held to make the clerk's notation ineffective as entry: Relying on *Taylor* and the literal language of the rule, Shuford takes the position that the trial judge must give "actual" direction. W. Shuford, *North Carolina Civil Practice and Procedure* § 58-5 (2d ed. 1981). This mirrors the federal decisions, which have consistently held that the identical federal rule gives the clerk no power to enter judgment under the second paragraph of Rule 58 absent a specific direction from the court. See 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2784 (1973); *Trans-America Ins. Co. v. Cannon-Lowden Co.*, 400 F. Supp. 817 (D. Mont. 1975).

Obviously, the better practice is for the trial judge to specifically direct the clerk as to entry of judgment, and for the parties to ensure that the provisions of such direction are included in the record on appeal. However, we agree with the result in the present case, supported at least in part by the case law. *Arnold v. Varnum*. As discussed above, the father's notice of appeal was thus timely under the tolling provisions of 4A N.C. Gen. Stat. App. I (2A), N.C. R. App. P. 3(c) (Supp. 1983). The motion to dismiss and the cross appeal are denied, and we proceed to consider the merits.

III

[2] The father brings forward numerous assignments of error, only a few of which require our detailed examination. Foremost among them is his contention that the trial court erred in ruling that the alimony and child support provisions of the 1964 order were not disjunctive and that accordingly he remained obligated to pay until all the conditions as set forth therein were met. We agree that the court incorrectly applied the law to arrive at this result.

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At the time the father signed the confession of judgment in 1964, the age of majority was 21, as it had been at common law. In the 1971 N.C. Sess. Laws ch. 585, § 1, as codified at N.C. Gen. Stat. ch. 48A (1976), the General Assembly abrogated the common-law definition and provided instead that "[a] minor is any person who has not reached the age of 18 years." These changes became effective 5 July 1971. *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972). On 5 July 1971 the courts of North Carolina lost their authority to say that a parent's legal obligation to pay support continues to twenty-one. *Id.* Therefore, the *Shoaf* Court held, a consent judgment providing for child support payments until majority or emancipation, entered into when the common-law definition controlled, could not be enforced if the child had reached 18 after the effective date of G.S. ch. 48A. In *Loer v. Loer*, 31 N.C. App. 150, 228 S.E. 2d 473 (1976), this Court followed *Shoaf* in interpreting a provision of a separation agreement requiring child support payments until the child reached 21 or became emancipated. We relied in *Loer* on the clearly expressed intent of the parties to provide for support until emancipation, that is, until the legal obligation of the supporting parent terminated. Of course, the rule in *Shoaf* and *Loer* does not affect the rights of parents to assume contractual obligations to provide more support than the law requires. See *Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E. 2d 444 (1978).

We believe that the rules enunciated in *Shoaf* and *Loer* apply equally to the confession of judgment in this case. See *Farmers' Bank of Clayton v. McCullers*, 201 N.C. 440, 160 S.E. 494 (1931) (effect of confession of judgment); 49 C.J.S. *Judgments* § 134 *et seq.* (1947). The judgment provided for support until the age of 21 or until the youngest child "should become self-supporting [or] marry." These provisions by themselves constitute substantial evidence of the intent to provide support only until the end of the legal obligation at emancipation, since the enumerated grounds are the principal bases for emancipation. See *Warren v. Long*, 264 N.C. 137, 141 S.E. 2d 9 (1965) (dependency); *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964) (marriage); *Shoaf* (legal age). With the further recitation of the father's desire to provide for his *minor* children until they became *of legal age*, this intent is made crystal clear. Our interpretation accords with that of another court construing remarkably similar language. *Schmitz v.*

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Schmitz, 70 Wis. 2d 882, 236 N.W. 2d 657 (Wis. 1975) (only substantive difference—lack of provision for death). Therefore, we hold that the child support terms of the confession of judgment only obligated the father to pay to age 18, not 21.

By its terms the confession of judgment provided that payments would continue until the last of the following events: the mother's death or remarriage and the attainment of majority of the youngest child. It is undisputed that the mother remarried in 1974, and that the daughter turned 18 on 13 April 1981. Therefore no court of this state had authority to compel the father to pay anything under this judgment after 13 April 1981. *Shoaf*; *Loer*. Accordingly, the court's order of 21 January 1983 is erroneous insofar as it (1) orders the father to pay arrears which accrued after 13 April 1981, and (2) orders him to resume regular weekly payments. The father's assignments of error relative to the effect of the daughter's status after 13 April 1981 are thus rendered moot.

IV

[3] We now must decide (1) whether the father could unilaterally reduce payments between 1974 and 1981 because of the remarriage of the mother and the majority of the son, and (2) if not, whether such reduction constituted willful contempt as found by the trial court.

A

The answer to the first question is clearly NO. The proper procedure for the father to follow was to apply to the trial court for relief. See N.C. Gen. Stat. §§ 50-13.7 (Supp. 1983), 50-16.9 (1976); *Tilley v. Tilley*, 30 N.C. App. 581, 227 S.E. 2d 640 (1976). This he failed to do. He had no authority to unilaterally attempt his own modification. *Id.* In *Halcomb v. Halcomb*, 352 So. 2d 1013 (La. 1977), the Supreme Court of Louisiana reached the same result on similar facts. The *Halcomb* Court explained its decision thusly:

[U]nless automatic reduction, modification or termination is provided for by operation of law, the award remains enforceable notwithstanding that a cause for reduction may have occurred which would, upon proper suit, warrant such a reduction. Support for this rule is found in a proper regard

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for the integrity of judgments. Such a regard does not condone a practice which would allow those cast in judgment to invoke self-help and unilaterally relieve themselves of the obligation to comply. Any other rule of law would greatly impair the sanctity of judgments and the orderly processes of law. To condone such a practice would deprive the party, in whose favor the judgment has been rendered, of an opportunity to present countervailing evidence, and at the same time deny the judge an opportunity to review the award in light of the alleged mitigating cause which had developed since its rendition.

352 So. 2d at 1016. This policy applies equally in North Carolina. *Tilley*.

B

If the father had no authority to reduce payments unilaterally, but did so nonetheless, does his action constitute contempt? We are aware of a line of cases allowing the supporting spouse to credit against payment expenditures and time periods the child spends with the supporting spouse, without being held in contempt. *Jarrell v. Jarrell*, 241 N.C. 73, 84 S.E. 2d 328 (1954); *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981). However, these cases involve actual out-of-pocket expenditures or situations in which the paying spouse provided the actual daily support. In the present case, by contrast, the amounts the father deducted did not correspond to any actual costs he paid, but rather to *his* perception of the proper modified level of payment. That determination must however rest with the courts. G.S. § 50-13.7 (Supp. 1983). We note also that, as a general rule, the credit theory has been used with considerable reluctance. *See* Annot., 47 A.L.R. 3d 1031 (1973). We therefore conclude that there is no support for ruling as a matter of law that the trial court erred in finding the father in contempt. Having reviewed the factual findings of the court, we further conclude that they amply support its conclusion that the father was in willful contempt. *See Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983) (ability to pay and non-payment are the only required factors); *Reece v. Reece*, 58 N.C. App. 404, 293 S.E. 2d 662 (1982) (similar ruling).

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V

[4] The court awarded the mother attorney's fees of \$600. The one finding supporting the award simply described in general terms what services her attorney had rendered. This sole finding will not support the award. *See Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980) (alimony case); *Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981) (child support case). It is accordingly vacated.

VI

Having found several substantial errors, we now must fashion appropriate relief. A substantial portion of the obligations which underlay the original judgment had terminated in 1974 when the father unilaterally reduced payments. We believe it would work an injustice to require him to pay according to the letter of the Order, especially when no demand for payment of ar-rears was made during a period of eight years. In similar cases involving child support, we have remanded for additional proceedings to prevent such an injustice. *Beverly v. Beverly*, 43 N.C. App. 60, 257 S.E. 2d 682 (1979); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977); *see also Wilkerson v. Indovina*, 405 So. 2d 1258 (La. Ct. App. 1981) (combined alimony and child support; remanded for determination of accumulated alimony). The rationale of these cases applies equally here, and we therefore vacate the order and remand for further proceedings.

This result does not mean that any reduction need eventually be made. The court may find that although the mother had remarried and the son had become an adult, the daughter's needs continued to merit payment of the entire \$45 per week. This cannot be ascertained from the present record however, and further proceedings consistent with this opinion are therefore necessary.

Vacated and remanded.

Judge JOHNSON concurs.

Judge WELLS dissents.

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Judge WELLS dissenting.

In my opinion, defendant's appeal was not timely made. I respectfully disagree with the majority decision as to the requirements of N.C. Gen. Stat. § 1A-1, Rule 58 of the Rules of Civil Procedure (1982), and vote to dismiss the appeal.

CAROLISTA C. FLETCHER v. BURTON H. JONES

No. 831SC873

(Filed 3 July 1984)

1. Judges § 1.1— judgment out of court and out of district

An entry of judgment out of court and out of district is proper only where permitted by statute or where the parties consent.

2. Vendor and Purchaser § 2— contract for sale of land—reasonable time for performance

As a general rule, a contract for the sale of land remains valid and binding for a reasonable time after the date set for closing unless the contract specifies an expiration date or clearly states that time is of the essence. What constitutes a "reasonable time" for performance depends on the nature of the contract, the purpose and conduct of the parties and all other relevant circumstances.

3. Vendor and Purchaser § 2— contract for sale of land—reasonable time for performance—question of fact and law

The issue of whether a reasonable time has elapsed for the performance of a contract to sell land presents a mixed question of fact and law to be decided by the trier of fact. However, where the facts of the case are simple, undisputed and can lead only to one conclusion, the issue presented becomes one of law which may be decided by the trial judge.

4. Vendor and Purchaser § 2.3— contract for sale of land—modification of closing date

An exchange of written, mutual promises to extend the closing date of a contract for the sale of land was binding upon the parties without further recitation of consideration. However, the vendor's unilateral, oral statements indicating his continuing willingness to convey the land as soon as his divorce became final were insufficient to constitute a valid second modification of the contract closing date.

5. Vendor and Purchaser § 2— contract for sale of land—reasonable time for performance—necessity for findings and conclusions

An action for specific performance of a contract for the sale of land must be remanded for further proceedings where the trial court made no adequate

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findings of fact or conclusions of law concerning whether a reasonable time for performance of the contract had elapsed between the agreed closing date of 10 March and 24 September when the vendor attempted to terminate the contract.

6. Vendor and Purchaser § 5— contract for sale of land—specific performance—no entitlement to development costs

If it is determined that defendant vendor breached a contract for the sale of land, plaintiff purchaser would not be entitled to recover expenses incurred in preparation to develop the land in addition to obtaining specific performance, since to award plaintiff specific performance as well as compensation for development costs would place plaintiff in a better position than she would have occupied had defendant conveyed.

Judge BECTON dissenting.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 18 March 1983 in DARE County Superior Court. Heard in the Court of Appeals 9 May 1984.

Plaintiff sought specific performance of a contract entered into on 18 August 1980, whereby defendant agreed to sell to plaintiff three lots located in Nags Head. The sale was subject to the condition that defendant first obtain either a divorce from his wife, or her consent to the sale. Closing date was set for 9 January 1981.

In its judgment, the trial court found that the following events and transactions occurred after the contract was signed. Defendant's wife refused to execute the deed and defendant was unable to obtain a divorce until 20 August 1981. Meanwhile, on 29 January 1981, the parties signed a written addendum to the contract, extending the closing date to 10 March 1981. Between 10 March and 4 August 1981 plaintiff and defendant spoke on several occasions and each time defendant assured plaintiff that his divorce would soon be final and that he intended to fulfill his contractual obligations. On 4 August 1981, when closing had still not taken place, defendant's attorney called plaintiff's attorney and indicated that defendant was still willing to sell the land. Plaintiff took no action. On 24 September 1981, defendant notified plaintiff by letter that he was withdrawing the offer to sell and returned the \$1,000.00 in earnest money previously given him by plaintiff.

By letter dated 26 September 1981, plaintiff's attorney sent to defendant's attorney an executed note and deed of trust pur-

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suant to the terms of the original contract. The letter also contained the \$1,000.00 escrow check and a downpayment on the property. Defendant refused to convey the property, however, and thereafter plaintiff filed a notice of *lis pendens* against the land and brought suit for specific performance of the contract. Plaintiff also sought damages for expenses she incurred in making plans to develop the land. Defendant filed a counterclaim for damages incurred by reason of the cloud upon his title created by the notice of *lis pendens*.

After a non-jury trial, the trial court granted plaintiff's claim for specific performance of the contract, but denied both plaintiff's and defendant's claims for damages. From the grant of specific performance, defendant appeals. Plaintiff cross-appeals from the trial court's order denying her claim for damages.

Aycock & Spence, by W. Mark Spence, for plaintiff.

Pritchett, Cooke and Burch, by W. W. Pritchett, Jr., for defendant.

WELLS, Judge.

[1] We note at the outset that judgment in this case was entered out of court and out of district from the 24 January 1983 term of Dare County Superior Court. Such an entry of judgment is proper only where permitted by statute, or, as here, where the parties consent. *Utilities Commission v. State*, 243 N.C. 12, 89 S.E. 2d 727 (1955), *reh. denied*, 243 N.C. 685, 91 S.E. 2d 899 (1956).

Defendant contends that the trial court erred in ordering specific performance of the contract, because it had either lapsed or been rescinded as of 26 September 1981, when plaintiff attempted to convey the executed note and deed of trust to defendant. Plaintiff contends that the time for performance of the contract was extended on 29 January and 4 August and a binding agreement existed on 26 September 1981.

To determine whether a valid contract existed on 26 September 1981, we must examine the legal effect of the events occurring between August 1980 and September 1981. Under the agreement executed on 18 August, closing in the land sale was to be held on 9 January 1981. The sale was conditioned, however, on

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defendant's ability to obtain a divorce from his wife or her consent to a deed by the closing date. This provision constitutes a condition precedent to the parties' obligation to perform under the contract. "Conditions precedent . . . are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty . . ." 3A *Corbin on Contracts* § 628 (1960 & 1971 Supp.), *Tire Co. v. Morefield*, 35 N.C. App. 385, 241 S.E. 2d 353 (1978).¹ It is clear therefore that neither party was obligated to perform under the contract unless the condition precedent was met by the closing date.

[2] It is undisputed that as of 9 January 1981 the condition precedent had not occurred and the parties were not required to perform, but it does not follow that the contract expired immediately thereafter. As a general rule, a contract for the sale of land remains valid and binding for a reasonable time after the date set for closing, *Scarborough v. Adams*, 264 N.C. 631, 142 S.E. 2d 608 (1965), unless the contract specifies an expiration date, or clearly states that time is of the essence, see *Douglass v. Brooks*, 242 N.C. 178, 87 S.E. 2d 258 (1955). There is no showing, nor do the parties contend that time was of the essence or that a specific expiration date was set in the case at bar. What constitutes a "reasonable time" for performance depends upon the nature of the contract, the purpose and conduct of the parties and all other relevant circumstances, *United States v. 969.46 Acres of Land, Chatham Cty., N.C.*, 386 F. Supp. 793 (M.D.N.C. 1974), *aff'd*, 535 F. 2d 1251 (4th Cir. 1976) (defining reasonable time to exercise option contract). See also *Rodin v. Merritt*, 48 N.C. App. 64, 268 S.E. 2d 539, *disc. rev. denied*, 301 N.C. 402, 274 S.E. 2d 226 (1980).

[3] The issue of whether a reasonable time has elapsed normally presents a mixed question of fact and law to be decided by the trier of fact, *Colt v. Kimball*, 190 N.C. 169, 129 S.E. 406 (1925). Where the facts of the case are simple, undisputed and can lead only to one conclusion, however, the issue presented becomes one of law which may be decided by the trial judge. *Id.* After a

1. Some jurisdictions have abandoned the use of the terminology "condition precedent" and "condition subsequent" on the grounds that such labels obscure, rather than aid, analysis of the parties' intent. See *Restatement (Second) of Contracts* § 224 (1981).

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reasonable time has elapsed, the contract is terminable at will by either party, upon reasonable notice to the other, *Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368 (1953).

The problem before us thus becomes to determine what date the parties set for performance, as that is the date from which they had a reasonable time in which to perform under the contract.

[4] We turn first to the agreement executed by the parties on 29 January 1981 purporting to extend the closing date to 10 March 1981. Contract terms may be validly modified where the modification has the consent of all parties and is supported by adequate consideration. *Corbin v. Langdon*, 23 N.C. App. 21, 208 S.E. 2d 251 (1974). Contracts for the sale of land must be in writing, N.C. Gen. Stat. § 22-2 (1965), and modifications of a land sale contract must also be written to be valid, see *Westmoreland v. Lowe*, 225 N.C. 553, 35 S.E. 2d 613 (1945). The undisputed facts in the case at bar show that the agreement of 29 January 1981 was in writing and was mutually agreed upon by the parties. Although the cases conflict somewhat, there is authority to support our position that an exchange of written, mutual promises to extend the duration of a contract for the sale of land is binding upon the parties without further recitation of consideration, *Childress v. Trading Post*, 247 N.C. 150, 100 S.E. 2d 391 (1957), 17 Am. Jur. 2d *Contracts* § 461 (1964), but see *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972). We hold, therefore, that the agreement executed by the parties on 29 January 1981 validly modified the contract and set 10 March 1981 as the new closing date.

Plaintiff contends, however, that defendant further modified the contract by virtue of his conversations with plaintiff between 10 March and 4 August 1981, indicating his continuing willingness to convey the land as soon as his divorce became final. The facts, as found by the trial court, show that these communications were oral and informal. There is no finding that either party intended to modify the terms of the existing contract, or that the parties exchanged mutual promises or other consideration. Under these circumstances, we hold that defendant's unilateral, oral statements were insufficient to constitute a valid modification of the

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contract closing date.² The final, binding agreement between the parties thus provided for closing on 10 March 1981 and the parties had a reasonable time thereafter to fulfill their obligations under the contract.

[5] Nevertheless, defendant's conversations with plaintiff constitute some evidence of the parties' intent as to time for performance and are thus relevant to the question whether defendant acted within a reasonable time after the March closing date. Although the facts in the case before us are undisputed and relatively simple, they do not inevitably lead to a single conclusion concerning whether a reasonable time had elapsed when defendant attempted to terminate the contract. The question is therefore one for the trier of fact, considering all the circumstances of the case, *Colt v. Kimball, supra*. The trial court made findings of fact concerning the passage of time between the March closing date and the time of defendant's termination, but made no adequate findings of fact or conclusions of law concerning whether a reasonable time had elapsed. Because the trial court failed to apply the proper legal standard to the facts in reaching its judgment, the case must be remanded for further proceedings consistent with this opinion.

[6] We turn now to plaintiff's cross appeal for \$40,400.00 in special damages incurred in reliance upon the land sale contract. In certain cases, special damages may be awarded in addition to specific performance if necessary to place a purchaser in the same position he or she would have occupied if no breach occurred. *See Winders v. Hill*, 141 N.C. 694, 54 S.E. 440 (1906), 71 Am. Jur. 2d *Damages* § 216 (1973). In the case before us, plaintiff incurred certain expenses as a result of her preparations to develop the land subject to the sales contract. While these expenses were incurred in reliance upon the contract, they are not attributable to defend-

2. Plaintiff points out that it has been held that a seller who orally requests an extension of the closing date under a land sale contract may not later avoid the contract by contending that the oral modification is void under the Statute of Frauds, *Johnson v. Noles*, 224 N.C. 542, 31 S.E. 2d 637 (1944). The rule of *Johnson* has been limited, however, to cases in which the party to be charged requested the extension and it was granted solely for his benefit, *Harvey v. Linker*, 226 N.C. 711, 40 S.E. 2d 202 (1946). In the case before us, it appears that both parties discussed extending time for performance under the contract and that the modification would benefit both plaintiff and defendant.

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ant's breach, if any. These are expenses that plaintiff would have incurred had defendant conveyed his land to plaintiff. To award plaintiff specific performance as well as compensation for her development costs would be to place her in a better position than she would have occupied had defendant conveyed. We hold, therefore, that even if the trier of fact determines on remand that defendant breached the contract, plaintiff's claim for special damages must be denied.

Affirmed in part and remanded.

Judge JOHNSON concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that defendant breached the contract and that plaintiff is entitled to specific performance, I dissent. *Harvey v. Linker*, 226 N.C. 711, 40 S.E. 2d 202 (1946) does not limit the application of *Johnson v. Noles*, 224 N.C. 542, 31 S.E. 2d 637 (1944) "to cases in which the party to be charged requested the extension and it was granted solely for his benefit," as suggested by the majority in n. 2, *supra*. On the contrary, the *Harvey* Court did not rule on the enforceability of an oral extension of the time for performance, which is mutually beneficial to the parties. *Johnson* controls the case *sub judice*.

The *Harvey* decision distinguished *Johnson* as a case dealing solely with the oral extension of the time for performance under the terms of an option contract, when "the extensions were . . . at the request and for the accommodation of the parties to be charged." 226 N.C. at 712, 40 S.E. 2d at 203. In *Johnson*, the defendant sellers orally agreed to extend the time for performance to avoid breaching the contract by failing to convey good title. Our Supreme Court refused to permit the defendant sellers, the parties to be charged, to assert the Statute of Frauds, after they had requested and benefited from the oral modification. The facts in *Harvey* are significantly different. There, the plaintiff buyers orally negotiated an extension of the time for performance and a reduction in the purchase price. The *Harvey* Court decided

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the case on the basis of the oral modification of the purchase price alone. The Court declined to enforce the modification of the purchase price, because it dealt with an essential term of the contract, the price, and had been made solely for the benefit of the plaintiffs, rather than the parties to be charged, as in *Johnson*. The *Harvey* Court's silence on the issue of the oral modification of the time for performance leaves *Johnson* unimpaired. See 8A G. Thompson, *Real Property* § 4455, at 324 (1963).

The facts in the case *sub judice* are comparable to those in *Johnson*. Defendant seller was unable to convey good title by the expiration date of the original contract and the written extension. Defendant continued to orally assure plaintiff, between 10 March and 4 August 1981, that he intended to fulfill his contractual obligations. Plaintiff, in reliance on defendant's assurances, incurred substantial expenses in plans to develop the land. Clearly defendant benefited by his written and oral agreements to extend the time; he avoided the loss of a sale. He should not be permitted now to assert the Statute of Frauds to commit a fraud on the plaintiff. His oral extensions of the time for performance are valid, despite the Statute of Frauds.

I now decide how long the contract remained in effect. On 4 August 1981, defendant's attorney informed plaintiff's attorney that defendant had finally obtained a divorce and property settlement from his wife, the condition precedent to fulfilling the contract. Defendant's attorney stated that defendant was ready to close according to the terms of the original contract. No closing date was set at that time. On 24 September 1981, plaintiff's attorney received a letter from defendant's attorney declaring the contract void. As stated by the majority, generally "a contract for the sale of land remains valid and binding for a reasonable time after the date set for closing [citation omitted], unless the contract specifies an expiration date or clearly states that time is of the essence." *Supra*, p. 4. Unilateral termination of the contract at will, upon reasonable notice to the other party, is only possible a reasonable time after closing. See *Fulghum v. Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368 (1953). In the case *sub judice*, the contract did not specify an expiration date or state that time was of the essence and, in the oral extensions, no date had been set for closing; therefore, not only was the contract in effect on 24 September 1981, but it could not be unilaterally terminated at will then.

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By unilaterally terminating it at will on 24 September 1981, defendant breached the contract, and plaintiff is entitled to specific performance.

To the extent that specific performance may not have made plaintiff whole, the trial court may have erred in failing to award plaintiff damages. *See* E. Farnsworth, *Contracts* § 12.5, at 825-26 (1982). This, however, we cannot determine since the trial court failed to make findings of fact on the damages issue. I would remand for further findings of fact.

CHARLES HAROLD LARGENT v. CALVIN C. ACUFF AND GRACE HOSPITAL, INC.

No. 8325SC211

(Filed 3 July 1984)

1. Physicians, Surgeons, and Allied Professions § 15.1— malpractice—expert testimony

In an action for medical malpractice there was no merit to defendant's contention that testimony of a medical expert witness was not sufficiently specific for the jury to do more than speculate as to the causation of plaintiff's paralysis, since the witness testified that "it is quite likely that the patient may have suffered less permanent damage," and "it is quite likely that the patient may indeed have had less permanent damage than he turned out to have" if he had had earlier surgery, and the witness's use of "quite likely" made his statement stronger than if he had used only the word "may."

2. Physicians, Surgeons, and Allied Professions § 21— malpractice—damages—reasonable certainty

There was no merit to defendant's contention in a medical malpractice action that plaintiff did not prove the amount of damages with enough certainty to support an award, since there was evidence that plaintiff was paralyzed by a fall; there was also evidence that the paralysis could have been ameliorated if certain medical procedures had been performed immediately after the fall; and it was difficult to prove with precision what part of the damages was caused by the failure to take the procedures.

3. Physicians, Surgeons, and Allied Professions § 20.2— malpractice—defendant's contentions improperly stated—prejudicial error

The trial court in a medical malpractice case erred in its jury charge by misstating defendant's contention with respect to his diagnosis and treatment of plaintiff, and it was crucial to defendant's case that his contention be prop-

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erly stated in light of testimony by a medical expert that defendant's treatment of plaintiff was negligent and based on a negligent diagnosis.

APPEAL by defendant Calvin C. Acuff from *Johnson, Judge*. Judgment entered 28 May 1982 in Superior Court, BURKE County. Heard in the Court of Appeals 6 February 1984.

This is an action for medical malpractice. The plaintiff was a patient of the defendant Calvin C. Acuff, a medical doctor, in Grace Hospital in Morganton, North Carolina, on Friday, 31 October 1974 at which time he went home for the weekend. The plaintiff began spitting blood on Sunday evening and returned to the hospital at approximately midnight. The plaintiff left his bed to go to the bathroom in the early morning hours and passed out. He was found on the floor of his room by nurses at approximately 4:00 a.m. A nurse called Dr. Acuff and told him Mr. Largent had fallen. She also told Dr. Acuff that Mr. Largent could talk but had told them he could not move. Dr. Acuff instructed the nurse to "log roll" and "sandbag" Mr. Largent. This is a procedure which immobilizes the patient and Dr. Acuff testified he had this done so that if the patient had a neck injury it would not become worse. Dr. Acuff went to the hospital at approximately 5:00 a.m. He gave Mr. Largent certain neurological tests to determine whether he had damage to his nervous system. He also had a portable x-ray done at his bedside. X-rays were done in the x-ray department that afternoon which were not seen by Dr. Acuff, who left for Hawaii the next morning for a medical seminar. The x-rays taken at Mr. Largent's bedside did not reveal any fracture but the x-ray taken in the x-ray department revealed he had an undisplaced fracture. When the x-ray taken in the x-ray department was seen by a neurosurgeon, an operation was performed. The plaintiff remains a quadriplegic.

Dr. Hiram B. Curry testified that in his opinion Dr. Acuff did not meet the standard of reasonable medical care of those in his profession with similar training and experience situated in a similar community in his treatment of Mr. Largent, when he did not return to the hospital at midnight when Mr. Largent re-entered the hospital, or in his treatment of Mr. Largent after he fell. Dr. Courtland Davis, a professor of Neurosurgery at Bowman Gray School of Medicine, testified that the paralysis incurred by the plaintiff when he fell was immediate and irreversible. In his

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opinion, there was nothing any doctor could have done that would have changed the course of events which were set in motion as a result of the plaintiff's fall. He testified that the operative procedure performed by Dr. Kim, the neurosurgeon, was not indicated and may have worsened the plaintiff's condition. Four family practitioners in Burke County testified that the defendant met the standard of care for family practitioners in Burke County.

The court submitted an issue of negligence as to the defendant's treatment of the plaintiff until the time of the fall which the jury answered in favor of the defendant. The court also submitted an issue of negligence as to the defendant's treatment of the plaintiff after the fall which was answered in favor of the plaintiff. The jury assessed damages in the amount of \$150,000.00. The defendant appealed.

Simpson, Aycock, Beyer and Simpson, by Samuel E. Aycock and Louis E. Vinay, Jr., for plaintiff appellee.

Mitchell, Teele, Blackwell, Mitchell and Smith, by W. Harold Mitchell and Marcus W. H. Mitchell, Jr., for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the denial of his motion to dismiss the action. He argues that the only evidence as to the causation of the plaintiff's injury was the testimony of Dr. Curry and this was not sufficient to establish proximate cause. Dr. Curry testified that in examining the medical records as to the action Dr. Acuff took when he came to the hospital after Mr. Largent fell, he observed that Dr. Acuff in his notes "comments about that the neck was freely movable." Dr. Curry testified:

"Well, here is a man who has paralyzed immediately on falling, paralyzed in both arms and legs, absolutely helpless and most anyone, I believe, would have surmised the man had a broken neck. Certainly had an injured spinal cord to cause him to be a quadriplegic, that is, paralyzed in all four extremities, and then for the doctor to examine him in such a manner and then write in his notes that his neck was freely movable, makes me cringe because greater damage could be

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done to the spinal cord. Ordinarily you exert great care in immobilizing the neck so that the patient would not move his neck and possibly have additional injury to the spinal cord."

Dr. Curry also testified:

"I believe that any general practitioner of my knowledge—I have never met a general practitioner in my life that I do not believe would have responded differently and I believe more appropriately than did Doctor Acuff in this situation. A man with a fall, with pain in the neck and shoulder, with immediate paralysis in both arms and both legs, and then to entertain the notion of hysteria, not to call for help, not to—seemingly not to even think about calling for the neurosurgeon, and you did have a neurosurgeon on your active staff. Even a nurse earlier had even asked if—earlier or about that time, even asked Doctor Acuff if he would like her to call Doctor Lee, the surgeon, or Doctor Kim, the neurosurgeon, and he declined."

Dr. Curry testified further that Mr. Largent had "in laymen's terms" a broken neck and went into some detail about the need for evaluating very quickly in order to prevent paralysis and possible damage to the spinal cord.

Questions were put to Dr. Curry which he answered as follows:

"Q. Do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty whether Dr. Acuff's failure to promptly request a consultation by a neurosurgeon after he discovered that Mr. Largent was unable to move his arms and legs, was breathing solely by diaphragm, and was complaining of pain in his neck and shoulder, was a cause of the paralysis suffered by Mr. Largent?

A. Yes. Let me discuss this just a little bit, because it is my believe [sic] that had Doctor Acuff called a neurosurgeon promptly and had the actions that were taken on Wednesday afternoon and Thursday morning, November 6th and 7th, had those actions been taken on Monday morning November the 4th, as soon as possible after the fall, then I believe that it is quite likely that the patient may indeed have had less perma-

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nent paralysis than he turned out to have. Is that a—does that embody the intent of your question?

Q. Yes. Doctor. Now, what is—upon what factors do you base that opinion?

A. Well, here we have a patient that has an immediate injury to the spinal cord that results in his paralysis of both arms and both legs, pain in his neck and he has a broken neck. When this—the x-rays taken later that day show the fractures. But, absolutely nothing is done in order to determine does more need to be done to try to safeguard that spinal cord. Finally, on Wednesday afternoon when Doctor Kim is brought into the case and he evaluates the tomograms and special—those are special x-rays of the neck—and he does a myelogram, then he decides yes, we need to go in and open this up, because there may be a blood clot there that's causing this abnormality visible on the x-ray. Now, if that action had taken place some seventy-two hours earlier, I believe that it is quite likely that the patient may have suffered less permanent damage."

The defendant argues that the testimony of Dr. Curry is not sufficiently specific for the jury to do more than speculate as to the causation of the plaintiff's paralysis. He points out that Dr. Curry testified "I believe that it is quite likely that the patient may indeed have had less permanent damage than he turned out to have" and "it is quite likely that the patient may have suffered less permanent damage." He contends that the use of the word "may" shows that Dr. Curry was speculating as to whether earlier surgery would have made any difference and the jury could not find from this testimony that the defendant's negligence caused the injury. We believe that considering all of Dr. Curry's testimony, it may be inferred that he felt the lack of early surgery was probably a contributing cause to the plaintiff's paralysis. The use of "quite likely" in the sentences referred to by the defendant make Dr. Curry's statement stronger than if he had used only the word "may." See *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964) for a case which holds that other evidence may be considered when an expert witness' answer is not sufficiently definite.

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We do not believe *Fisher v. Rogers*, 251 N.C. 610, 112 S.E. 2d 76 (1960) and *Garland v. Shull*, 41 N.C. App. 143, 254 S.E. 2d 221 (1979), relied on by the defendant, govern. In *Fisher* our Supreme Court stated the rule that "Expert testimony of a future consequence of a prior and subsisting injury as evidence of prospective damages must be in terms of the certain or probable and not of the possible." (Citations omitted.)" *Supra* at 613-14, 112 S.E. 2d at 78. It held there was no error in admitting expert testimony in that case. The testimony was not similar to the testimony of Dr. Curry in this case. In *Garland* this Court held it was error to allow a medical expert to give his opinion as to future consequences of an injury when he testified he did not know the exact length of time the injury would last. We do not believe *Garland* has any application to this case.

[2] The defendant also contends that the plaintiff has not proved the amount of damages with enough certainty to support an award. He argues that the only evidence of damages is the testimony of Dr. Curry that because of the failure to have earlier surgery the plaintiff may have had "less permanent damage than he turned out to have" and that he may "have suffered less permanent damage." He says this does not provide a reasonable basis for the awarding of \$150,000.00 in damages. The Restatement (Second) of Torts § 912 at 478 (1979) says:

"One to whom another has tortiously caused harm is entitled to compensatory damages if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."

Dobbs on Remedies § 3.3 at 151 (1973) says in part:

"Where the plaintiff can prove the fact of damage, but not the extent of it, the reasonable certainty rule as it is now applied in most courts does not require proof of damages with mathematical precision. It does require that the plaintiff adduce some relevant datum from which a 'just and reasonable' estimate of the amount might be drawn, and without any such datum in the evidence, the claim will necessarily be dismissed as speculative and conjectural. Beyond this, the plaintiff is probably expected to prove his damages with as much accuracy as is reasonably possible to him, but precision

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not attainable in the nature of the claim and the circumstances is not ordinarily required."

In this case there was evidence that the plaintiff was paralyzed by a fall. There is also evidence that the paralysis could have been ameliorated if certain medical procedures had been performed immediately after the fall. It is difficult to prove with precision what part of the damages was caused by the failure to take the procedures. We believe the plaintiff has proved with as much precision as possible his damages.

[3] The defendant also contends the court committed error in the charge by misstating his contentions. We believe this assignment of error has merit. The defendant testified that he could find no evidence of fracture to the plaintiff's neck when he examined him immediately after returning to the hospital but he treated the plaintiff as if he had a broken neck. The defendant asked the court to charge the jury that he contended that not only was the diagnosis of hysterical paralysis a reasonable diagnosis, but that he proceeded in his care and treatment as if there had been, in fact, a fracture of the neck. The court charged as follows:

"The defendant further says and contends that . . . in making his diagnosis and judgment that plaintiff was suffering from hysteria paralysis; that his diagnosis was made after he had received the nurse's report regarding the plaintiff, and after he had examined the bedside x-rays . . . and only after he had made a careful and proper examination and investigation of the plaintiff's condition.

The defendant further says and contends that under such circumstances it was not necessary nor in accordance with applicable standards of practice for a general practitioner to request consultation with a neurological specialist."

The court misstated the contention of the defendant. Dr. Curry felt from his examination of the record that the defendant had diagnosed the plaintiff's condition as hysteria paralysis but the defendant's contention is that he did not make this diagnosis. The defendant contends that he considered this a possibility but he treated the plaintiff as if he had a broken neck. Because Dr. Curry placed such emphasis on what he felt was negligence in not

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having a neurosurgeon examine the plaintiff early on Monday morning, which failure Dr. Curry felt was on account of a negligent diagnosis, we believe it was crucial to the defendant's case that his contention be properly stated. The failure to do so is error which requires a new trial.

We shall discuss some of the defendant's other assignments of error as the questions they pose may arise at a subsequent trial.

The defendant's third assignment of error is to the court's refusal to strike what he contends were inflammatory remarks by Dr. Curry in his testimony. He objects specifically to his statements "And, for the doctor to advise the patient to go to the hospital and then the doctor not to see the patient, that is illogical and it's open to a great deal of criticism"; as to the patient's being restricted "He should have—there is just no question in my mind about that"; "and then write in the notes that his neck was freely movable, makes me cringe because greater damage could be done to the spinal cord"; and "I believe that any general practitioner of my knowledge—I have never met a general practitioner in my life that I do not believe would have responded differently and I believe more appropriately than did Dr. Acuff in this situation."

The defendant contends that these statements were jury speeches and not proper expressions of opinion. He argues they were too inflammatory to be admitted into evidence. An expert witness is allowed to conform his answer to his true opinion. See *Mann v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973) and *Walters v. Tire Sales and Service*, 51 N.C. App. 378, 276 S.E. 2d 729, *disc. rev. denied*, 303 N.C. 320, 281 S.E. 2d 660 (1981). We hold that pursuant to this rule the answers of the expert were properly admitted.

The defendant assigns error to the admission of testimony as follows:

"Q. Dr. Curry, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty whether Dr. Acuff's tentative diagnosis of hysteria upon examining Mr. Largent on the morning of November the 4th

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was a cause of the paralysis which Mr. Largent continues to have today?

A. Well, now, the hysteria being a cause of the paralysis—let me make this comment: The very fact that Doctor Acuff entertained the diagnosis of hysteria, the very fact that he made that diagnosis of hysteria perhaps postponed or at least prevented his taking proper action to explore what was the cause of the paralysis in the four extremities and the pain in the neck, for there is nothing in the record to suggest that he addressed that at all. He just addressed the blood loss.”

The defendant contends this answer was not responsive. We believe it is clear from this answer that Dr. Curry was stating his opinion that Dr. Acuff's failure to properly diagnose Mr. Largent's trouble was a cause of his failure to take the proper action.

We do not discuss the defendant's other assignments of error as the questions they pose may not recur at a subsequent trial. The plaintiff did not appeal from the verdict in favor of the defendant as to his negligence prior to the plaintiff's fall. We do not disturb the verdict as to this part of the case. For the reasons stated in this opinion, we order a new trial as to the defendant's negligence subsequent to the fall.

New trial.

Chief Judge VAUGHN and Judge BRASWELL concur.

NADEAN O. HUFF v. CLARENCE WRIGHT (PETE) HUFF, III

No. 8330DC669

(Filed 3 July 1984)

1. Injunctions § 10.1— irreparable injury—sufficiency of evidence

A finding that plaintiff wife, who had filed a divorce action in this state, would suffer irreparable injury for which she had no adequate remedy at law in the absence of an order restraining defendant husband from proceeding with a subsequent Florida divorce action was supported by evidence that, if

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plaintiff were required to litigate the divorce action in Florida, she would incur the cost of travel to and from Florida on several occasions prior to trial, she would incur temporary living expenses during trial and additional attorney fees, issues nearly identical to those raised in this state would be litigated and determined pursuant to laws and procedures different from those of the state in which the parties resided when plaintiff's action was instituted, and such dual litigation could result in similar or identical issues being resolved in a contradictory manner.

2. Injunctions § 10.1; Rules of Civil Procedure § 65— ex parte restraining order— absence of service on defendant or counsel

An *ex parte* order restraining defendant husband from proceeding with a Florida divorce action or from commencing any additional suits arising out of the marital contract was not defective for want of service on defendant or his counsel. G.S. 1A-1, Rule 65(b).

3. Injunctions § 10.1— restraining action in another state

Where the trial court had personal jurisdiction over defendant husband, the court found that defendant had not denied residency in North Carolina, and plaintiff wife filed an action for divorce from bed and board in this state, the trial court had the power to restrain defendant from proceeding with a subsequent Florida action for an absolute divorce.

4. Injunctions § 16; Rules of Civil Procedure § 65— restraining suit in another state—failure to require posting of security

The trial court did not err in restraining defendant husband from proceeding with a Florida divorce action without requiring plaintiff wife to post security since (1) defendant's Florida action could be viewed as a type of interference with plaintiff during the pendency of her previously filed divorce action; (2) one purpose of the restraining order was to preserve the court's jurisdiction over the subject matter involved; and (3) the record established no material damage or likelihood of harm to defendant husband from issuance of the restraining order and established that plaintiff wife had considerable assets with which to respond in damages for the wrongful issuance of the order. G.S. 1A-1, Rule 65(c).

APPEAL by defendant from *Leatherwood, Judge*. Order entered 3 March 1983 in District Court, HAYWOOD County. Heard in the Court of Appeals 10 April 1984.

Elmore & Powell, P.A., by Bruce A. Elmore, Jr., for plaintiff appellee.

Riddle, Shackelford & Hyler, P.A., by Robert E. Riddle, for defendant appellant.

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WHICHARD, Judge.

I.

The parties were married to each other and resided in Haywood County, North Carolina, but maintained a residence in Florida as well. On 30 July 1982 plaintiff-wife filed for divorce from bed and board in Haywood County. Defendant-husband filed a "motion, answer and counterclaim" in response. Thereafter, on 4 January 1983, defendant-husband filed for absolute divorce in Palm Beach County, Florida.

Upon motion of plaintiff the trial court in Haywood County issued an *ex parte* order restraining defendant-husband from proceeding with the Florida action or from commencing any additional suits arising out of the marital contract. It did not require any security from plaintiff-wife as a condition precedent to issuance of the order.

From this order, defendant-husband appeals.

II.

[1] Defendant-husband contends the court erred in entering the order upon plaintiff's unverified motion and without making findings of fact to establish irreparable damage. He also contends entry of the order was "defective" because neither the motion nor the order was served on him or his counsel of record.

G.S. 1A-1, Rule 65(b) states, in pertinent part:

A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by *verified complaint* that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.

(Emphasis supplied.) The order indicates that in entering its findings of fact and conclusions of law, the court considered plaintiff-wife's complaint, which was verified as required for consideration under G.S. 1A-1, Rule 65(b), together with other pleadings in this case and pleadings filed in the Florida court. The verified complaint here alleges that the parties are citizens and residents of Haywood County, and had been for six months prior to com-

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mencement of this action. The order indicates that the court took that into account, together with the following considerations:

If plaintiff-wife were required to litigate the divorce action in Florida, she would incur the cost of travel to and from Florida on several occasions prior to trial (including a trip to meet with a family conciliation counselor in Florida nine days after the Florida complaint was filed, as ordered by the Florida court). She also would incur temporary living expenses during trial and additional attorney's fees. Issues identical or nearly identical to those raised here would be litigated, and the rights of the parties would be determined, pursuant to laws and procedures different from those of the state in which the parties resided when this action was instituted. Such dual litigation could result in similar or identical issues being resolved in a contradictory manner, thereby leading to further conflict, further litigation, and additional expense to plaintiff-wife.

These considerations justified the conclusion that absent the restraining order, plaintiff-wife would suffer irreparable injury for which she had no adequate remedy at law.

[2] The order was not "defective" for want of service on defendant-husband or his counsel. G.S. 1A-1, Rule 65(b) expressly provides for granting a temporary restraining order without notice to the adverse party. The purpose of such an order, issued *ex parte*, is "to preserve the status quo" pending a full hearing. See *Lambe v. Smith*, 11 N.C. App. 580, 582, 181 S.E. 2d 783, 784 (1971) (quoting 7 Moore's Federal Practice § 65.05 (2d ed. 1970)). The initial restraining order here directed subsequent appearance by the parties to show cause why the order should not be continued. The subsequent appearance was continued for one day by consent of counsel for both parties. Defendant-husband appeared and testified at the subsequent hearing. His contention that the order is "defective" for want of service on, or notice to, him or his counsel, is thus without merit.

III.

[3] Defendant-husband contends the court erred in restraining him from proceeding with the Florida action for absolute divorce. We find no error.

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In *Thurston v. Thurston*, 256 N.C. 663, 124 S.E. 2d 852 (1962), an action by a wife for alimony without divorce, our Supreme Court affirmed an order restraining the husband from "seeking to obtain a divorce . . . from the plaintiff in any state other than North Carolina until after the final determination of this action." *Id.* at 666, 124 S.E. 2d at 853. It quoted with approval the following from 17A Am. Jur. *Divorce and Separation* § 998, at 182-83 (1957):

In accord with the general rules concerning the power of one state to enjoin the commencement or prosecution of an action in another state or country, a court of equity of a state in which the parties have had their matrimonial domicile and in which one of them continues to reside has the power, under appropriate circumstances, to enjoin the other from procuring a divorce in another jurisdiction. The plaintiff in a pending divorce action may, when jurisdiction over the defendant has been obtained, be entitled to an order enjoining the defendant from prosecuting a subsequent action for divorce in another state before the former action is determined.

256 N.C. at 668, 124 S.E. 2d at 855.

The parties have stipulated that defendant-husband was duly served with summons. Proper service, combined with subject matter jurisdiction, empowered the court to exercise personal jurisdiction over defendant-husband. G.S. 1-75.6.

Given personal jurisdiction, the court had authority, pursuant to *Thurston*, to issue the restraining order. We find defendant-husband's effort to distinguish *Thurston* unavailing, and the cases from other jurisdictions on which he relies (*Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 N.E. 2d 623 (1951), and *Smith v. Smith*, 364 Pa. 1, 70 A. 2d 630 (1950)) distinguishable. Unlike defendant-husband here, the husbands held improperly restrained from bringing foreign actions in those cases had been the first spouse to bring an action relating to the marital contract.

The facts here more closely resemble those in *Brown v. Brown*, 120 R.I. 340, 387 A. 2d 1051 (1978). The spouses in *Brown* were domiciled in Rhode Island when the wife commenced an action for divorce from bed and board. The husband entered a

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general appearance, but later established domicile in Maryland where he commenced an action for absolute divorce. The trial court in Rhode Island enjoined him from proceeding with the Maryland divorce action, and the Supreme Court of Rhode Island affirmed. It held that the Rhode Island court had obtained personal jurisdiction over the husband for purposes of the suit, and that "jurisdiction continued . . . regardless of [his] place of domicile." *Id.* at 344, 387 A. 2d at 1054.

The *Brown* court noted that "the better view is . . . that a person's bona fide domicile in another state 'is not determinative . . . [but] is a factor to be weighed with all the others.'" *Id.* at 347 n. 4, 387 A. 2d at 1055 n. 4 (quoting *Stambaugh v. Stambaugh*, 458 Pa. 147, 164-65, 329 A. 2d 483, 492 (1974) (Roberts, J., dissenting)). It further noted that "[f]oreign domicile is less significant . . . where the courts of the injunctive state have acquired jurisdiction of a matrimonial action between the parties prior to establishment of the foreign domicile and institution of the foreign action." *Id.* at 345, 387 A. 2d at 1055. It upheld the injunction (1) "in order to prevent a multiplicity of suits," (2) "because of the possibility of conflicting decisions on . . . issues common to both suits," and (3) because the Rhode Island trial court "had an interest in preserving its prior jurisdiction over [the] controversy." *Id.* at 346, 387 A. 2d at 1055; see also *Psaty v. Psaty*, 93 Misc. 2d 454, ---, 402 N.Y.S. 2d 779, 781 (Sup. Ct. 1978) (husband's action for separation stayed because brought subsequent to wife's action for divorce); *Immerman v. Immerman*, 134 N.Y.S. 2d 296, 298 (Sup. Ct. 1954) ("when a cause is once in a court which has jurisdiction of the subject matter and the parties, that court will retain jurisdiction to the exclusion of other courts"); *Bedient v. Bedient*, 190 Misc. 480, ---, 74 N.Y.S. 2d 456, 457 (Sup. Ct. 1947) (husband who "voluntarily invoked the jurisdiction of the New York courts by commencing . . . action . . . not . . . permitted to nullify any judgment [wife might] obtain on her counterclaim by . . . simultaneously maintaining another action in another state").

The considerations on which the *Brown* court based its decision are present here. The trial court here properly found from the record that defendant-husband had not denied residency in North Carolina. As noted, the court had personal jurisdiction over him, and it clearly had such over plaintiff-wife. "[A] court . . . which has acquired jurisdiction of the parties, has power, on

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proper cause shown, to enjoin them from proceeding with an action in another state" *Childress v. Motor Lines*, 235 N.C. 522, 531, 70 S.E. 2d 558, 564 (1952) (quoting 43 C.J.S. *Injunctions* § 49, at 499). The "courts of a State where both parties are domiciled may restrain the prosecution of suits between such parties in a foreign jurisdiction." *Carpenter v. Hanes*, 162 N.C. 46, 48, 77 S.E. 1101, 1101 (1913). The court thus had power to issue the restraining order. Given the considerations which prompted the court's action—viz, the cost to plaintiff-wife of defending the Florida action, the possibility of conflicting resolutions of identical issues, and the resultant possibility of further conflict and further litigation—we hold the order a proper exercise of the court's power.

IV.

[4] Defendant contends the court erred in issuing the restraining order without requiring, as a condition precedent, that plaintiff-wife post security. G.S. 1A-1, Rule 65(c) states, in pertinent part:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . . In suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce no such security shall be required of the plaintiff spouse as a condition precedent to the issuing of a temporary restraining order or preliminary injunction enjoining the defendant spouse from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit

The trial court specifically stated in its order that "[n]o security shall be required of the Plaintiff . . . since this is a suit between spouses relating to divorce from bed and board, alimony, temporary alimony, possession of personal property and attorney fees." We believe it properly could view defendant-husband's Florida action as a type of "interfering with . . . plaintiff . . . during pendency of [this] suit." Its restraining order thus fell within the G.S. 1A-1, Rule 65(c) express exclusion from the usual security requirements.

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Further, this Court has stated that "it is well-settled that no security is required when a preliminary injunction is issued to preserve the trial court's jurisdiction over the subject matter involved." *Keith v. Day*, 60 N.C. App. 559, 561, 299 S.E. 2d 296, 297 (1983). It is at least implicit in the findings and conclusions that one purpose of the restraining order was to preserve the court's jurisdiction over the subject matter involved.

Finally, this Court has indicated that the rule for North Carolina practice under G.S. 1A-1, Rule 65(c) is that the trial court has power to dispense with any security requirement where the restraint will do defendant "no material damage," . . . where there 'has been no proof of likelihood of harm,' . . . and where the applicant for equitable relief has 'considerable assets and [is] . . . able to respond in damages if [defendant] does suffer damages by reason of [a wrongful] injunction.'" *Keith, supra*, 60 N.C. App. at 562, 299 S.E. 2d at 298 (quoting *Federal Prescription Service, Inc. et al. v. American Pharmaceutical Assoc.*, 636 F. 2d 755, 759 (D.C. Cir. 1980)). The record establishes no material damage or likelihood of harm to defendant-husband from issuance of the restraining order. It also establishes that plaintiff-wife has considerable assets with which to respond in damages if defendant-husband subsequently is found to have suffered from wrongful issuance of the order.

We find no abuse of the court's discretion in its failure to require that plaintiff post security as a condition precedent to issuance of the restraining order.

Affirmed.

Judges WEBB and HILL concur.

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STATE OF NORTH CAROLINA v. BEN CASEY NELSON

No. 8311SC646

(Filed 3 July 1984)

1. Criminal Law § 105.1— motion to dismiss—introduction of evidence—no renewal of motion

Defendant, by introducing evidence in his behalf, waived his right to argue on appeal the denial of his motion to dismiss made at the close of the State's evidence. G.S. 15-173.

2. Criminal Law § 106.2— sufficiency of circumstantial evidence

When a motion to dismiss calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances, and, if so, it is for the jury to decide whether the facts, taken singly or together, satisfy them beyond a reasonable doubt that the defendant is guilty.

3. Homicide § 21.4; Robbery § 4.2— voluntary manslaughter—common law robbery—identity of perpetrator—sufficiency of evidence

In a prosecution of defendant for common law robbery and voluntary manslaughter, evidence was sufficient to support a reasonable inference of defendant's guilt where the jury could find that the person defendant's companion testified that defendant assaulted was in fact the victim named in this case; money defendant was counting in his companion's presence was taken from the victim; and the victim died as a result of injuries received in the assault rather than from a longstanding respiratory problem.

4. Homicide § 15.5— cause of death—expert opinion admissible

The trial court in a prosecution for voluntary manslaughter did not err in allowing a doctor to state his opinion as to the cause of the victim's death, since the witness was tendered and received as an expert in the field of general medicine; he based his opinion on the totality of the evidence before him regarding the injuries the victim received on the night of the assault as well as the victim's preexisting lung disease, and on the witness's medical treatment of him from the date of the assault until his death; and the witness's opinion thus rested on an ample foundation.

5. Homicide § 30.3— voluntary manslaughter—instruction on involuntary manslaughter not required

Where all of the evidence indicated that defendant was committing the felony of robbery at the time of the assault, defendant was not entitled to an instruction on involuntary manslaughter.

6. Homicide § 23.2— manslaughter—cause of death—statutory duty to report—instruction not required

The trial court properly refused to give an instruction on the requirements of G.S. 130-198 that the attending physician report to the medical examiner of the county the death of any person apparently caused by a

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criminal act or by unusual or unnatural circumstances, since evidence of the victim's preexisting lung disease, the attending physician's failure to report the death to the county medical examiner, the fact that no autopsy was performed, and that on the death certificate the attending physician listed cardiac arrest as the cause of death only raised a jury question on the weight and credibility of the State's evidence that the victim died as a result of the injuries he received at the time of the assault, and the court sufficiently and properly instructed the jury on the credibility of the witnesses and on weighing the credibility of the evidence.

7. Criminal Law § 138.6— sentence—aggravating factors—crime committed for hire or pecuniary gain—counsel at prior convictions

In imposing sentences for voluntary manslaughter and common law robbery, the trial court erred in considering the aggravating factor that the offenses were committed for hire or pecuniary gain, since there was no evidence of record that defendant was "hired" or "paid" to commit the offenses; however, because defendant failed to raise the issue at the trial level, he could not complain on appeal that the record was silent as to the issue of indigency and lack of assistance of counsel on a prior conviction and the court should not consider the aggravating factor of prior convictions.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 12 January 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 16 January 1984.

Defendant was tried and convicted of common law robbery and voluntary manslaughter. From judgments imposing an active sentence of eight years for common law robbery and twenty years for voluntary manslaughter, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Joseph L. Tart, for defendant appellant.

JOHNSON, Judge.

The State offered evidence tending to show that Cleveland Thomas and defendant lived with defendant's mother in Dunn, North Carolina. Cleveland Thomas testified that on 22 June 1982, between 10 p.m. and 11 p.m., he and defendant were returning home in an automobile driven by Thomas. As they approached the Dunn Chapel Church, defendant recognized a tall and slim elderly black man walking across the street. The man was carrying some items in his arms. Defendant directed Thomas to stop the automobile, stating that the man always carried money. When he

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stopped the car, defendant jumped out and approached the man as if he was going to talk to him, but instead, grabbed the man by the arm and from the back. The man dropped the items he was carrying as defendant grabbed him and yelled, "stop, don't do it, I'll give you anything if you don't do it." Defendant then dragged the man between the church and another building. A short while later, defendant ran back to the car, jumped in and stated that he "got it" and told Thomas to drive off. Defendant was counting approximately \$130.00 in paper money as he got back into the car, and again stated that the man always had money on him. Defendant also stated that the man was carrying some cabbage. Finally, defendant told Thomas not to tell anyone and gave Thomas \$20.00 of the money.

The State's evidence further showed that on 22 June 1982, the victim, William H. Evans, was 77 years of age, lived with his great-granddaughter, Elaine Jones, at 612 East Harnett Street, behind the Dunn Chapel Church. Mr. Evans left the house at about 8 p.m. wearing a hat and a blue and white striped shirt. At about 9 p.m., Ms. Jones discovered Mr. Evans on his knees on the outside of their house. He was trying to get up onto the porch and was asking for help. The right side of his face was swollen, his jawbone was crushed and he was bleeding from the ears and nose. He was treated at the emergency room of the hospital and admitted on 23 June 1982, where he remained until his death on 18 July 1982. At or about 11:15 p.m., 22 June 1982, Mr. Evans' hat, a torn part of his shirt, a receipt bearing his name, some cabbage, squash and blood were found in the alley beside Dunn Chapel Church. Ms. Jones testified further that between 22 June and 18 July 1982, the deceased received no injuries in addition to the ones he received 22 June.

Dr. John Mann was tendered and received as an expert in the field of general medicine. He testified that he examined and admitted Mr. Evans to the hospital on 23 June 1982. Mr. Evans remained hospitalized and Dr. Mann treated him from 23 June until his death on 18 July 1982. An examination of Mr. Evans on the 23rd revealed that the entire left side of his face was depressed from multiple facial bone fractures, that he had suffered a fractured nose, a bruised chest wall, abdominal pain and had poor respiratory effort. Dr. Mann further testified that he was knowledgeable concerning Mr. Evans' pre-existing condition and that he

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was of the opinion that Mr. Evans died as a result of the injuries he received on 22 June 1982.

Defendant offered evidence which tended to show that he had known the deceased for several years preceding 22 June 1982; that on 22 June 1982 he lived two blocks from 612 East Harnett Street where Ms. Jones and the deceased were living; and that he did not assault or rob the deceased and never saw the deceased on 22 June 1982. Defendant's further evidence tended to show that the deceased had a long history of respiratory problems and that an autopsy was never performed on the body of the deceased to determine the cause of death.

Defendant assigns error to the court's denial of his motions to dismiss at the close of the State's evidence and at the close of all the evidence and denial of his motion to set aside the verdict as contrary to the weight of evidence.

Defendant argues that the evidence is insufficient to show that the person Cleveland Thomas testified that defendant assaulted was in fact William H. Evans or that the money Thomas testified that defendant was counting was taken from William H. Evans or that William H. Evans died as a result of any injuries received in the assault.

[1] Defendant, by introducing evidence in his behalf, waived his right to argue on appeal the denial of his motion to dismiss made at the close of the State's evidence. G.S. 15-173; *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). Therefore, only his motion made at the close of all the evidence may be considered on appeal. *State v. Mendez*, 42 N.C. App. 141, 256 S.E. 2d 405 (1979). When ruling on a motion to dismiss, the question for the court is whether substantial evidence to support a reasonable inference of the defendant's guilt has been introduced. In deciding this question, the trial court must consider the evidence in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the court in ruling upon the motion. *State v. Thomas*, 52 N.C. App. 186, 278 S.E. 2d 535, cert. denied, 305 N.C. 591, 292 S.E. 2d 16 (1982).

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[2] When the motion calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or together, satisfy them beyond a reasonable doubt that the defendant is guilty. *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980).

[3] When the evidence is viewed in the light most favorable to the State and when contradictions and discrepancies are left to the jury to resolve, *State v. Thomas, supra*, there is sufficient evidence to support a reasonable inference of defendant's guilt of each offense. A jury could find that Mr. Evans was the individual defendant recognized, grabbed and dragged to a location beside the Dunn Chapel Church, where he was assaulted and from whom defendant took the money he was counting when he returned to the car. Further, the jury could find from the evidence presented that Mr. Evans died as a result of the injuries he sustained in that assault and robbery. Therefore, the court properly denied defendant's motions to dismiss.

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court and is not reviewable on appeal in the absence of abuse of that discretion. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 100 S.Ct. 1841, 64 L.Ed. 2d 264 (1980). Where there is sufficient evidence to support the verdict, the trial court acts within its discretion in denying defendant's motion. *Boykin, supra*; *State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971). Here, the evidence is sufficient to support the jury's verdict in each case. Consequently, the court properly denied defendant's motion.

[4] Defendant contends the trial court erred in allowing Dr. Mann to state his opinion as to the cause of Mr. Evans' death. Defendant argues that there was an insufficient foundation for Dr. Mann's opinion and a lack of competent evidence upon which to base that opinion.

Dr. Mann was tendered and received as an expert in the field of general medicine. He based his opinion on the totality of the evidence before him regarding the injuries Mr. Evans sustained on 22 June 1982; Mr. Evans' basic lung disease pre-existing 22

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June 1982; and his medical treatment of Mr. Evans from 23 June 1982 until Mr. Evans' death on 18 July 1982. Thus, the doctor's opinion rested on an ample foundation and we find this assignment of error to be without merit.

By his next two assignments of error, defendant contends the trial court erred in the admission and exclusion of certain other evidence. We have carefully examined these assignments of error and find them to be totally without merit.

[5] Additionally, defendant assigns error to the trial court's refusal to instruct the jury on involuntary manslaughter and G.S. 130-198. However, the trial court is not required to charge the jury upon the question of defendant's guilt of a lesser degree of a crime charged in an indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser charge. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). In the case *sub judice* defendant was charged in a bill of indictment with second degree murder. The State proceeded to trial on the charge of voluntary manslaughter. The trial court submitted "guilty of voluntary manslaughter" or "not guilty" as the possible verdicts. Defendant argues that involuntary manslaughter should have also been submitted as a possible verdict.

Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminally negligent way. *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977). All of the evidence in the case at bar indicates that defendant was committing the felony of robbery at the time of the assault. There was no evidence to the contrary. Consequently, defendant was not entitled to an instruction on involuntary manslaughter.

[6] Defendant contends the court erred in refusing to give his requested special instructions on G.S. 130-198 which provides, in pertinent part, that the attending physician shall report to the medical examiner of the county the death of any person apparently caused by a criminal act or by unusual or unnatural circumstances. Defendant argues that since the evidence showed that Mr. Evans suffered basic lung disease prior to 22 June 1982, and that on the death certificate Dr. Mann listed cardiac arrest as the cause of death, and that Dr. Mann failed to report Mr. Evans' death to the county medical examiner, and that no autopsy was

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performed, defendant was entitled to an instruction on the requirements of G.S. 130-198. Defendant cites no authority for his contention and in our research we find none.

We believe the evidence of Mr. Evans' pre-existing lung disease, Dr. Mann's failure to report the death to the county medical examiner, that no autopsy was performed, and that on the death certificate Dr. Mann listed cardiac arrest as the cause of death, only raises a jury question on the weight and credibility of the State's evidence that Mr. Evans died as a result of the injuries he received on 22 June 1982. From a careful review of the trial judge's jury charge, we find the trial court sufficiently and properly instructed the jury on the credibility of the witnesses and in weighing the credibility of the evidence offered by the State. No additional instructions were necessary and the court properly refused to give an instruction on the requirements of G.S. 130-198.

Defendant also assigns error to the trial court's instruction on the charge of common law robbery. We note that defendant failed to object to the jury charge as it relates to the charge of common law robbery, although given the opportunity to object to the charge out of the hearing of the jury, and although he did in fact object to the failure of the court to give his requested instructions. Therefore, defendant has not preserved this assignment for appellate review. Rule 10(b)(2) of the Rules of Appellate Procedure. Nonetheless, we have carefully reviewed the entire charge and find it to be without prejudicial error.

[7] By his final assignment defendant contends the court erroneously considered factors in aggravation.

In imposing a twenty year sentence for the voluntary manslaughter conviction the court found the following aggravating factors:

- (3) The offense was committed for hire or pecuniary gain.
- (10) The victim was very young, or very old, or mentally or physically infirm.
- (15) The Defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

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In imposing an eight year sentence for the common law robbery conviction, the court made separate findings of aggravating factors Nos. (10) and (15) above. Defendant contends the trial court erroneously considered aggravating factors Nos. (3) and (15) as they relate to the voluntary manslaughter conviction and aggravating factor No. (15) as it relates to the common law robbery conviction. Defendant argues that there is no evidence of record to support a finding that the homicide was committed for hire or pecuniary gain or that defendant had counsel or had waived his right to counsel for his prior convictions.¹

We agree that the trial court erroneously considered aggravating factor No. (3) since there is no evidence of record that defendant was "hired" or "paid" to commit the offense. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). In *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), the Court ruled that the initial burden for raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. In the case at bar, defendant failed to raise the issue at the trial level and, therefore, will not be heard to complain on appeal that the record is silent as to the issue of indigency and lack of assistance of counsel on a prior conviction. *Thompson, supra*.

We find no error in defendant's conviction in each case and no error in defendant's sentence in the common law robbery case (82CRS5891). For error in finding aggravating fact No. (3), defendant is entitled to a new sentencing hearing in the voluntary manslaughter case (82CRS6122). *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). The voluntary manslaughter case is remanded to the Superior Court, Harnett County, for resentencing.

No error in defendant's convictions.

No error in defendant's sentence in Case No. 82CRS5891.

Remand Case No. 82CRS6122 for resentencing.

Chief Judge VAUGHN and Judge WEBB concur.

1. Defendant testified that he has been convicted of breaking and entering, larceny, forgery, and attempted common law robbery.

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WILLIAM T. BUIE AND WIFE MARTHA BUIE, ET AL. v. RICHARD C. JOHNSTON

No. 8318SC628

(Filed 3 July 1984)

Deeds § 20.7; Injunctions § 15— restrictive covenant in subdivision—structure changed to acceptable use—enforcement of injunction to remove not required

Where plaintiffs obtained a mandatory injunction ordering defendant to remove an incomplete structure which violated restrictive covenants in their subdivision, plaintiffs commenced contempt proceedings when defendant failed to comply with the injunction, defendant responded that he had abandoned his plan which violated the covenants and intended instead to use the foundation for a garage in conformity with the restrictive covenants, and defendant claimed that enforcement of the injunction would no longer be equitable and moved for relief under G.S. 1A-1, Rule 60, the trial court erred in limiting the evidence it considered in ruling on defendant's motion when it improperly excluded certain questions regarding plaintiffs' vengeful motive; moreover, the court erred in limiting its wide equitable discretion and requiring defendant to remove the foundation, since the purpose of the injunction was clearly to insure compliance with the intent of the restrictive covenants; the covenant at issue clearly permitted construction of a garage; and defendant should not be required to remove a serviceable foundation in slavish obedience to the wording of an injunction where its purpose could be accomplished by more economic, less destructive means.

APPEAL by defendant from *Washington, Judge*. Judgment entered 14 January 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 April 1984.

Robert R. Schoch for defendant appellant.

*Boyan, Nix & Boyan, by Clarence C. Boyan and Robert S. Boyan, for plaintiff appellees.*¹

BECTON, Judge.

I

Defendant, Richard C. Johnston, commenced construction of a second home on his property in violation of restrictive covenants

1. We note that the caption of the Record on Appeal lists the plaintiffs as William T. Buie and wife Martha Buie, et al. This is contrary to Appendix B of the North Carolina Rules of Appellate Procedure which requires that the caption reflect the title of the action as it appeared in the trial division. All parties should be named.

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governing land use in the subdivision. Plaintiff neighbors, including the Buies (the Buies), sued to stop construction, obtained an injunction, and on appeal, this Court held that the Buies were entitled to a mandatory injunction ordering the removal of the incomplete structure. *Buie v. Johnston*, 53 N.C. App. 97, 280 S.E. 2d 1 (1981). The Buies commenced contempt proceedings when Johnston failed to comply with the injunction. Johnston responded that he had abandoned his plan to build a second residence and intended instead to use the foundation for a garage, in conformity with the restrictive covenants. Johnston submitted architectural plans and specifications for the garage with his response. He claimed that enforcement of the injunction would no longer be equitable, and moved for relief under N.C. Gen. Stat. § 1A-1, Rule 60 (1983). After an extensive hearing, the trial court ruled that Johnston had failed to show sufficient change of circumstances or other grounds for relief and denied his motion. Johnston appeals. We hold that the trial court erred in restricting its inquiry and in failing to exercise its equitable powers, and we reverse.

II

Johnston seeks relief under the provisions of G.S. § 1A-1, Rule 60(b) (1983), which provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time . . . A motion under this section does not affect the finality of a judgment or suspend its operation.

These provisions are nearly identical to those of Rule 60(b) of the Federal Rules of Civil Procedure, which has been described as a

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"grand reservoir of equitable power to do justice in a particular case." *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E. 2d 706, 708 (1976); see also *Thompson v. Kerr-McGee Refining Corp.*, 660 F. 2d 1380 (10th Cir. 1981); *Compton v. Alton Steamship Co.*, 608 F. 2d 96 (4th Cir. 1979). Particularly, Rule 60(b)(6) of the Federal Rules of Civil Procedure, the residual clause, indicates that courts are no longer "hemmed in" by the "uncertain boundaries" of common law remedies in taking appropriate action to accomplish justice. *Klaprott v. United States*, 335 U.S. 601, 93 L.Ed. 266, 69 S.Ct. 384 (1949). We elect to follow the federal precedent, and we conclude (1) that the trial court had equitable power under G.S. § 1A-1, Rule 60, to grant defendant's motion, and (2) that Johnston's garage proposal complied with our decision on the earlier appeal. The questions then become, as Johnston presents them, did the trial court err (1) in limiting the evidence it considered in ruling on Johnston's motion, and (2) in declining to exercise its equitable power.

III

We consider, first, Johnston's argument that the trial court improperly excluded certain questions regarding the Buies' alleged vengeful motive. Historically, our trial courts sat as triers of fact in equity cases (as did the trial court in the present case). Accordingly, the ordinary rules of evidence applicable to jury trials are to some extent relaxed in equity cases. *Cameron v. Cameron*, 232 N.C. 686, 61 S.E. 2d 913 (1950); 1 H. Brandis, *North Carolina Evidence* § 4a (2d rev. ed. 1982). Breadth and flexibility are inherent in equitable doctrines. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 L.Ed. 2d 554, 91 S.Ct. 1267 (1971). Furthermore, the trial court has the duty to adjust and balance competing private interests and public policy considerations in deciding whether to grant equitable relief and, if so, what relief to grant. *Hecht Co. v. Bowles*, 321 U.S. 321, 88 L.Ed. 754, 64 S.Ct. 587 (1944). These considerations lead us to the conclusion that the scope of relevant evidence used to determine whether the circumstances warrant equitable relief is broad indeed. See N.C. Gen. Stat. § 8C-1, Rule 401 (Supp. 1983) (broad definition of relevance under new North Carolina Rules of Evidence).

The Buies argue, as they did successfully in the trial court, that the equity court's inquiry must be strictly limited, relying on

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United States v. Swift & Co., 286 U.S. 106, 76 L.Ed. 999, 52 S.Ct. 460 (1932). We note that *Swift* was decided *before* the adoption of Rule 60(b) of the Federal Rules of Civil Procedure, and the *Klaprott* decision. In any event, it simply limits inquiry to *changes in circumstances*, but does not limit the *types* of changes in circumstances (such as motive), which are relevant and may be inquired into. Consequently, the trial court should have allowed the questions relating to the Buies' alleged motive.

The Buies further argue that Johnston's assignment of error is, at best, inartfully preserved. However, the significance of the evidence is obvious from the record, and we hold that the objection is properly before us. See *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978), *relying on Armour and Co. v. Nard*, 463 F. 2d 8 (8th Cir. 1972). The questions themselves appear in the record, along with extensive argument, and their import is obvious. The Buies have offered no evidence to show any substantial motive for their tenacious insistence on the literal terms of the mandatory injunction, despite Johnston's effort to use his existing structure in compliance with the restrictive covenants. The trial court's ruling thus prejudicially kept out evidence favorable to Johnston which the Buies apparently could not contradict. Significantly, the Buies concede that Johnston could tear down the existing foundation and in its place build the garage he now proposes to build on the existing foundation without violating the restrictive covenant.

IV

Relying again on *Swift*, the Buies urge that we should, nevertheless, affirm since Johnston has not shown that the dangers which prompted the mandatory injunction, "once substantial, have become attenuated to a shadow," nor that enforcement of the injunction will subject Johnston to "hardship so extreme and unexpected as to justify us in saying that [he is] the [victim] of oppression." 289 U.S. at 119, 76 L.Ed. at 1008, 52 S.Ct. at 464. Johnston's new plan to use the foundation for a garage is the only change revealed by his evidence. He has invested some \$8,000 in the existing structure and could remove it entirely at a cost of some \$2,000. On the other hand, Johnston's evidence indicates that, by investing an additional \$8,000 in the construction of the garage, Johnston would increase the value of his property from

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\$60,000 to \$80,000, in addition to avoiding an economic loss of about \$10,000, a net economic improvement. As the trial court found, this difference represents only an economic loss to Johnston and would probably not, in and of itself, justify modification of the injunction under the strict rule in *Swift*.

Swift dealt with oppressive and potentially criminal conspiracies in violation of the Sherman Act. Federal courts have subsequently questioned the wisdom of its literal application, particularly in the more routine case in which injunction has issued against activity less threatening to the welfare of society. See *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 20 L.Ed. 2d 562, 88 S.Ct. 1496 (1968) (*Swift* must be read in light of its facts); *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F. 2d 31 (2d Cir. 1969) (*Swift* rule too severe in average case); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 601-4 (1973).

The purpose of the original injunction obviously must guide the trial court in ruling on any request for modification. In *Swift*, the injunction restrained the activity of major corporations which had attempted (and still possessed the necessary equipment and distributive systems) to control the national grocery market. These operative facts had not changed when the corporations requested relief. Therefore, the insistence of the *Swift* Court on a showing of "grievous injury" is understandable.

When the operative facts *have* changed, however, such that continued enforcement of the injunction would work a wrong, the federal courts have been more liberal. In *System Federation No. 91 v. Wright*, 364 U.S. 642, 5 L.Ed. 2d 349, 81 S.Ct. 368 (1961), the Supreme Court held that the district court abused its discretion in denying a request for modification to allow union shops under a consent decree, when, since the signing of the consent decree, Congress had enacted legislation allowing union shops. And in *Flavor Corp. v. Kemin Industries, Inc.*, 503 F. 2d 729 (8th Cir. 1974), the court approved an order "clarifying" an injunction, which allowed an advertiser to participate in national campaigns otherwise limited by the injunction, under certain prophylactic conditions subsequently proposed by the advertiser.

In this case the purpose of the injunction was clearly to ensure compliance with the intent of the restrictive covenants.

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While it is clear that the Buies would have suffered some harm without the injunction, it obviously does not approach in any way the harm to society of the activity enjoined in *Swift*. We ordered removal of the foundation on the earlier appeal because "[t]he restrictive covenants are intended to preserve the value and character of the subdivision; and a useless, incomplete residential structure would be at least as detrimental to property values and the character of the neighborhood as a completed one." *Buie v. Johnston*, 53 N.C. App. at 101, 280 S.E. 2d at 3. At that time, Johnston intended to construct a second residence, clearly barred by the covenants. Since then, however, he has changed his plans, and introduced substantial evidence of his present plan to construct a garage, clearly allowed by the covenants. The foundation no longer represents "a useless, incomplete residential structure," but a useful, when completed, garage. Again, since the Buies have no objection to Johnston's building a garage from "scratch," Johnston should not be prohibited from building a garage from the existing foundation.

The operative facts on which the original injunction depends have thus changed. As a result, and in light of the vast difference between the threat in *Swift* and the threat in this case, we hold that the trial court erroneously limited its wide equitable discretion by relying on *Swift*.

V

The trial court further erroneously limited its discretion by relying on *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388 (1954), and by ruling that *Ingle* controlled. It is true that we relied on *Ingle* in the earlier appeal, but the circumstances have changed since our earlier opinion. In *Ingle*, defendant built a house too close to the front line of his property, in knowing violation of an express provision of a restrictive covenant. Our Supreme Court held that a mandatory injunction was appropriate for removal of the structure: obviously defendant could not comply with the setback limits by changing the nature of the structure. However, that logic does not apply here.

The *Ingle* Court further held that defendant should be enjoined from further construction, since the covenants also allowed only a single residence on each lot and the new building was a third residence on defendant's two lots. Like the covenants in this

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case, however, the covenants in *Ingle* allowed construction of garages in addition to homes. In contrast to the present case, defendant in *Ingle* did not propose to convert his existing foundation to a garage, and the Supreme Court expressed no opinion as to the possible result under such circumstances. Therefore, *Ingle* does not *compel* the result reached in the trial court.

To the contrary, *Ingle* and the general rules of restrictive covenants it applied require reversal in the case *sub judice*. The *Ingle* Court stated:

[I]t is to be noted that we adhere to the rule that since these restrictive servitudes are in derogation of the free and unfettered use of land, covenants and agreements imposing them *are to be strictly construed against limitations on use*. . . . Therefore, restrictive covenants clearly expressed may not be enlarged by implication or extended by construction. They must be given effect and enforced as written. [Emphasis added.]

240 N.C. at 388-89, 82 S.E. 2d at 394 (quoting *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E. 2d 619, 624 (1954)). The Supreme Court has recently reaffirmed this rule in *J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E. 2d 174 (1981), as has this Court in *Knox v. Scott*, 62 N.C. App. 732, 303 S.E. 2d 422 (1983). The restrictive covenants at issue clearly permit construction of a garage, and Johnston, in the exercise of his freedom to use his land within the bounds of the restrictive covenants, has a perfect right to construct one. We will not require him to remove a serviceable foundation in slavish obedience to the wording of an injunction, since its purpose can be accomplished by more economic, less destructive means.

VI

Our ruling is consistent with the decisions of other jurisdictions. Courts of equity have consistently refused to order removal of structures when the owner had a right to rebuild on the same spot for a different use. In the leading case of *Kajowski v. Null*, 405 Pa. 589, 177 A. 2d 101 (1962), defendants built and operated a machine shop in knowing violation of a restrictive covenant. Plaintiffs sued and obtained a mandatory injunction ordering removal of the machine shop. On appeal, the Supreme Court of Penn-

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sylvania refused to uphold the removal of the building, although it allowed a continuing injunction against its use as a machine shop. The *Kajowski* Court, in language equally applicable here, held:

This is one of those rare cases where both sides will win, but at the same time, necessarily both will lose something. For the [defendants] to expect to continue operating a machine shop in the face of the specific prohibition in their deed against machine shops is excessive expectation. For the [plaintiffs] to expect the demolition of an excellent, useful, good-looking building in the face of the money invested and the labor expended, is also excessive expectation where the building can be devoted to uses consistent with the restrictive covenant.

405 Pa. at 592-93, 177 A. 2d at 103. The *Kajowski* Court rejected plaintiffs' contention that defendants must tear the building down for proceeding in the face of warnings of suit:

A court of equity is a tribunal where revenge or punishment in the way of reprisal has no place. A court is not a feuding arena where the Capulets and Montagues lunge with legal swords at one another. Justice repels, reason abhors, logic condemns and fundamental equity principles reject that a new building should be destroyed when its demolition accomplishes no more than satisfy one of the parties that he had correctly foretold the state of the legal weather. In the case of *Haig Corporation v. Thomas S. Gassner Co.*, 163 Pa. Super. 611, 614, 63 A. 2d 433, 434 [(1949)], the Court very properly said that '* * * acts which, though irregular and unauthorized, can have no injurious result, constitute no ground for relief.'

405 Pa. at 595-96, 177 A. 2d at 104. We find the reasoning in *Kajowski* persuasive. See also *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1856) (dissolving injunction to remove bridge where subsequently declared by Congress not to be obstruction); *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N.E. 216 (1911) (no point in ordering destruction where defendants could simply erect duplicate structure; instead enjoin prohibited activity). We conclude that the destruction of Johnston's existing foundation would be a pointless

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waste and inconsistent with established equitable principles. The true purpose of the covenant, the restriction of residential density, can be accomplished without destruction by a continuing injunction against prohibited uses of the structure.

VII

To summarize, we hold that the trial court erroneously excluded evidence of the Buies' motives and erroneously limited its equitable discretion. The order denying Johnston's motion is therefore reversed, and the cause remanded for entry of an order allowing the motion.

Reversed and remanded.

Judges WEBB and EAGLES concur.

MICKEY DUMOUCHELLE AND TWYLA NARAGON v. DUKE UNIVERSITY

No. 8314SC924

(Filed 3 July 1984)

1. Dead Bodies § 3— damages for mishandling or mutilation of body

The person entitled to possession of a body may recover damages for mental suffering caused by negligent or intentional mishandling or mutilation of the body, and if such mishandling or mutilation is wilful, malicious or grossly negligent, punitive damages may also be recovered.

2. Dead Bodies § 1— funeral arrangements—wishes of next-of-kin contrary to wishes of decedent—effect of statute

The statute providing that directions of the next-of-kin shall govern the disposal of the remains of a decedent, G.S. 90-210.25(e)(2), does not express a legislative intent that the wishes of the next-of-kin concerning funeral arrangements must prevail over the wishes of the decedent.

3. Dead Bodies § 1— instructions in will concerning burial—authority of executor to act before probate

Since G.S. 28A-13-1 clearly permits a personal representative to carry out written funeral instructions before formal appointment, it follows that there is no need to wait for probate when the instructions are contained in the will. G.S. 130A-406.

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4. Dead Bodies § 1—burial instructions by next-of-kin—contrary instructions by personal representative—no duty to inform next-of-kin

Where decedent's next-of-kin instructed defendant hospital to cremate decedent's body, but decedent's personal representative canceled the cremation and instructed defendant to send the body to Ohio for burial pursuant to decedent's wishes, defendant had no duty to inform the next-of-kin of the change in funeral plans before they took place.

5. Dead Bodies § 1—testamentary provision for burial—conflicting wishes of next-of-kin

A testamentary provision directing disposition of the decedent's body must prevail over conflicting wishes of the decedent's next-of-kin. Therefore, the next-of-kin in such a case have no right to possession of the body for the purpose of selecting funeral arrangements and have no standing to sue defendant hospital for negligence in its failure to carry out their instructions for cremation of decedent's body.

APPEAL by plaintiffs from *Lee, Judge*. Order entered 16 May 1983 in DURHAM County Superior Court. Heard in the Court of Appeals 4 June 1984.

Plaintiffs filed this suit against defendant, seeking compensatory and punitive damages for alleged breach of contract and negligence relating to the disposition of their mother's body.

The pleadings, affidavits and answers to discovery reveal the following events and circumstances. Plaintiffs' mother, a Florida resident, died in defendant's hospital on 5 September 1980. Upon learning of their mother's death, plaintiffs paid \$200.00 and instructed defendant to cremate the body. Plaintiffs then drove to Florida, where they discovered their mother's will and learned for the first time that it was Mrs. Post's wish to be buried in Ohio. Plaintiffs did not attempt to cancel the cremation as they believed it had already been completed. Plaintiffs then contacted Robert Randolph, Mrs. Post's grandson, and told him that he had been named executor of the will, but did not inform him of the provision for burial in Ohio.

During her life Mrs. Post told Randolph she wanted to be buried in Ohio, and on learning of her death, Randolph telephoned defendant and cancelled the cremation. It is unclear whether Randolph told defendant that the change in funeral plans was due to his personal wishes or those of Mrs. Post. Defendant did not contact plaintiffs or consult them before carrying out Randolph's in-

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structions to have the body shipped to Ohio for burial. Plaintiffs learned of the change in plans about two months later.

Defendant issued a refund check for the \$200.00 cremation fee in September 1980, but the check was returned uncanceled. After plaintiffs filed suit, defendant sent another check to plaintiffs' attorney on 1 April 1982.

Following completion of discovery, defendant moved for summary judgment, which was granted on 20 July 1983. From entry of the order granting defendant's motion, plaintiffs appealed.

Richard N. Weintraub for plaintiffs.

Newsom, Graham, Hedrick, Bryson, Kennon & Faison, by E. C. Bryson, Jr. and David S. Kennett, for defendant.

WELLS, Judge.

A motion for summary judgment is properly granted under N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). Summary judgment is a somewhat drastic remedy and should be granted cautiously, especially in actions alleging negligence as a basis of recovery. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

Plaintiffs contend that the trial judge erred in granting summary judgment for defendant because genuine issues of material fact remain and because defendant is not entitled to judgment as a matter of law.

In reviewing the merits of plaintiffs' appeal, we turn first to their claim for damages for mental anguish resulting from defendant's alleged negligent disposition of Mrs. Post's body. In order to establish actionable negligence, plaintiff must show (1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of plaintiffs' injury. *See*

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Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E. 2d 559 (1984) and cases cited therein.

[1] The person entitled to possession of a body may recover damages for mental suffering caused by negligent or intentional mishandling or mutilation of the body, *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E. 2d 214 (1964). If such mishandling or mutilation is wilful, malicious or grossly negligent, punitive damages may also be recovered. *Id.* As a general rule, only the person entitled to possession and disposition of a body may maintain an action for mishandling or mutilation of the body. See *Gurganious v. Simpson*, 213 N.C. 613, 197 S.E. 163 (1938), Annot., 48 A.L.R. 3d 261 (1973).

In the case before us, plaintiffs allege no mutilation of their mother's body by defendant, but only that the body was mishandled when defendant arranged for burial of Mrs. Post's body, instead of cremation, as requested by plaintiffs. Plaintiffs' argument rests upon the proposition that a decedent's nearest next-of-kin have final authority over funeral arrangements. As a general rule, the next-of-kin have the right to possess the body of a decedent for the purpose of burial. *Parker v. Quinn-McGowen Co.*, *supra*. The issue of whether the wishes of the decedent concerning burial may prevail over those of the next-of-kin has never been directly addressed by the courts of our state. There is authority, however, for the proposition that a testamentary provision concerning burial should override contrary wishes of the decedent's next-of-kin. In *Kyles v. R. R.*, 147 N.C. 394, 61 S.E. 278 (1908) our supreme court noted in dicta that "[t]he right to the possession of a dead body for the purpose of preservation and burial belongs, *in the absence* of any testamentary disposition, to the surviving husband or wife or next of kin . . ." (Emphasis added.) Although the foregoing language was dicta, it has been cited with approval by our supreme court in at least one later case, *Floyd v. R.R.*, 167 N.C. 55, 83 S.E. 12 (1914) and we see no reason to adopt a contrary rule today.¹ *Parker v. Quinn-McGowen Co.*, *supra*, cited by plaintiffs as opposing authority, is inapposite as it does not deal

1. The courts of other jurisdictions are somewhat divided over the degree of deference accorded a decedent's wishes concerning disposition of his or her body, Annot., 54 A.L.R. 3d 1037 (1973), 7 A.L.R. 3d 747 (1966), although most courts appear to accord at least some weight to the decedent's expressed desires. *Id.*

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directly with the issue whether the wishes of the next-of-kin prevail over a testamentary provision for disposition of the testator's body.

[2] Plaintiffs also contend that the language of N.C. Gen. Stat. § 90-210.25(e)(2) (1981 & 1983 Cum. Supp.) expresses a legislative intent that the wishes of the next-of-kin concerning funeral arrangements must prevail. The statute provides, in relevant part: "No funeral service establishment shall accept a dead human body . . . without having first made due inquiry as to the desires of the next of kin . . . If any such kin be found, his or her authority and directions shall govern the disposal of the remains of such decedent. . . ." The statute plaintiffs rely on does not resolve the issue before us, as it does not directly address the question of the effect of a testamentary provision for funeral arrangements.

[3] Plaintiffs next contend that an executor has no authority to act prior to formal appointment by a probate court. Plaintiffs overlook N.C. Gen. Stat. § 28A-13-1 (1976) which provides, in pertinent part:

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to his body, funeral and burial arrangements. . . .

Plaintiffs also argue that a testamentary provision for disposition of the testator's body can have no validity before the will is probated, but cite no authority for their position. Plaintiffs' argument runs counter to the intent of G.S. § 28A-13-1. Since the terms of the statute clearly permit a personal representative to carry out written funeral instructions before formal appointment, it follows that there is no need to wait for probate when the instructions are contained in a will. We find further support for our position in N.C. Gen. Stat. § 130A-406 (1983 Supp.), which provides that gift of part or all of a body may be made by will and becomes effective on the death of the donor without waiting for probate. If the will is later declared invalid, the anatomical gift remains valid to the extent that it has been acted upon in good

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faith. We think that a similar rule should apply to cases of testamentary directions for disposition of the testator's body. The provision must be treated as valid upon the death of the testator, and funeral directors who act upon the provision in good faith cannot later be held liable in tort because they acted before the will was probated.

[4] Plaintiffs next contend that, even if the wishes of a testator prevail over those of the next-of-kin, defendant had a duty to inform them of the change in funeral plans before they took place. Again, plaintiffs cite no support for their position nor are we willing to impose such a duty.

[5] Based on the foregoing discussion, we hold that a testamentary provision directing disposition of the testator's body must prevail over conflicting wishes of the testator's next-of-kin.² It follows that the next-of-kin in such a case have no right to possession of the body for the purpose of selecting funeral arrangements and therefore they have no standing to sue defendant for negligence for its failure to carry out the cremation of Mrs. Post's body. *Accord, O'Dea v. Mitchell*, 350 Mass. 163, 213 N.E. 2d 870 (1966).

We turn now to plaintiffs' claim for mental anguish stemming from defendant's breach of the cremation contract. Plaintiffs' standing to sue for breach of the contract rests upon the right to direct disposition of their mother's body, for the reasons stated in the discussion of plaintiffs' tort claim. While plaintiffs may neither enforce the cremation contract, nor collect damages for mental anguish caused by its breach, defendant must return the \$200.00 cremation fee to plaintiffs to avoid unjust enrichment. Defendant has stipulated that plaintiffs are entitled to a refund, and the record clearly shows that plaintiffs' attorney has been issued a \$200.00 check by defendant. Under the facts before us, we

2. Although we only decide today that a written testamentary provision overrules conflicting wishes of the next-of-kin concerning disposition of the testator's body, we note that G.S. § 28A-13-1 permits the personal representative of the deceased to carry out written instructions pertaining to disposition of the body, whether they appear in a will or not. The statute does not deal with the authority of other persons to carry out the deceased's wishes, nor does it discuss the validity of oral instructions. As a general rule, we note that courts of most other jurisdictions appear to permit enforcement of orally stated preferences, *see* Annot., 54 A.L.R. 3d 1037 (1973) and cases cited therein.

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hold that summary judgment was properly entered for defendant.

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM MACK PERRY AND WESLEY PERRY

No. 836SC1002

(Filed 3 July 1984)

1. Indictment and Warrant § 15— motion to quash not timely

By pleading and participating in the trial without ever making motions to quash, defendants waived their right to challenge the propriety of the issuance of the warrants and indictments.

2. Searches and Seizures § 3— search of cornfield—no expectation of privacy

In a prosecution of defendants for possession with intent to manufacture and manufacture of marijuana, there was no merit to defendants' contention that marijuana plants seized from cornfields farmed by defendants should have been excluded as the fruits of an illegal search, since the plants were found in a cornfield and beside a packhouse not near a dwelling or in an area in which defendants demonstrated they had a legitimate expectation of privacy.

3. Narcotics § 4.3— marijuana in cornfield—constructive possession—sufficiency of evidence

In a prosecution of defendants for possession with intent to manufacture and manufacture of marijuana, evidence was sufficient to be submitted to the jury where it tended to show that at least 39 marijuana plants were being grown in a cornfield farmed by defendants. G.S. 90-95(a)(1); G.S. 90-87(15).

4. Constitutional Law § 67— identity of informant—no disclosure required

The trial court did not err in denying defendants' motion to discover the identity of the confidential informant who told police about marijuana being grown in defendants' field, since defendants did not demonstrate that disclosure was essential to a fair trial.

5. Criminal Law § 92.1— defendants charged with same offense—consolidation proper

The trial court acted within its discretion in consolidating for trial the cases of defendants who were charged with the same offenses arising from the same set of circumstances.

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6. Criminal Law § 51.1— expert testimony—no finding as to witness's qualification

In a prosecution for possession with intent to manufacture and manufacture of marijuana, the trial court did not err in admitting the sheriff's testimony about the marijuana, its value, weight, and the stages involved in its growth and harvest, though the court made no finding as to the witness's qualifications as an expert, since, in the absence of a special request by the defense, such a finding is deemed implicit in the trial court's admission of the challenged testimony.

7. Criminal Law § 43— admissibility of photographs

In a prosecution for possession with intent to manufacture and manufacture of marijuana, the trial court did not err in admitting photographs of marijuana plants and the cornfield where they were found growing, since the photographs were used to illustrate a witness's testimony.

8. Criminal Law § 88.3— cross-examination as to collateral matters

Where a shoplifting incident involving a State's witness was wholly collateral to the issue at trial, defense counsel was bound by the witness's answers denying involvement, and the trial court properly excluded testimony seeking to show to the contrary.

APPEAL by defendants from *Barefoot, Judge*. Judgment entered 5 May 1983 in Superior Court, BERTIE County. Heard in the Court of Appeals 4 June 1983.

Defendant, William Mack Perry, and his son, defendant Wesley Perry, were each charged in separate indictments with possession with intent to manufacture marijuana and manufacture of marijuana. After a consolidated trial, defendants were found guilty of both offenses and sentenced to two years.

The State's evidence tended to show: On 29 September 1982, law enforcement officers were informed of marijuana being grown on land farmed by defendants. The officers searched the farm and found two recently cut stalks of marijuana lying about four feet from the back of a packhouse. They also discovered marijuana plants growing in the back of a cornfield. Though the corn was dried out, the marijuana plants were green and healthy. Also in the cornfield was a galvanized washtub holding manure. A path led from the area of the cornfield where the marijuana plants grew to the packhouse and barn area. Defendants stipulated at trial that thirty-nine plants removed from the cornfield by law enforcement officers were marijuana.

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State's witness, Rita Perry, testified that during the summer of 1982, she saw Mack Perry remove marijuana plants from the barn and replant them in an area near the field where the plants were discovered.

Attorney General Edmisten, by James Peeler Smith, Assistant Attorney General, for the State.

Rosbon D. B. Whedbee, for defendant appellants.

VAUGHN, Chief Judge.

[1] We summarily reject defendants' first contention that their arrest warrants and subsequent indictments were issued without probable cause. By pleading and participating in the trial without ever making motions to quash, defendants waived their right to challenge the propriety of the issuance of the warrants and indictments. *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838, cert. denied and appeal dismissed, 277 N.C. 459, 177 S.E. 2d 900 (1970); see G.S. 15A-952; G.S. 15A-955; *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980) (a motion to dismiss an indictment is waived unless it is made at or before the arraignment).

[2] At trial, the State introduced into evidence, over defense counsel's objection, marijuana plants seized from the cornfields farmed by defendants. Defendants contend that this evidence should have been excluded as the fruits of a search illegal under the fourth amendment. We find no merit in defendants' contention. The right to protection under the fourth amendment from governmental intrusion depends not upon a property right but upon whether there exists in the invaded area a reasonable expectation of privacy. *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977). Areas our courts have excluded from the protective guarantees of the fourth amendment include open fields, orchards, or lands not an immediate part of a dwelling site. See *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). The marijuana plants seized in this case were found in a cornfield and beside a packhouse not near a dwelling or in an area in which defendants demonstrated they had a legitimate expectation of privacy.

[3] Defendants next contend that the trial court erred by denying their motions for a directed verdict or for nonsuit. We find no error.

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In testing the sufficiency of evidence to sustain a conviction upon a motion for a directed verdict or for nonsuit, the evidence must be considered in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom. *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978); *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed. 2d 124 (1978). Contrary to defendants' contention, it is irrelevant that the State relied primarily on circumstantial evidence to prove defendants' guilt. If there is substantial evidence, whether direct, circumstantial, or both that a crime was committed and that defendants committed it, then a motion for nonsuit or dismissal is properly denied. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Defendants in this case were charged with possession with intent to manufacture marijuana and felonious manufacture of marijuana in violation of G.S. 90-95(a)(1). The record reveals evidence of defendants' possession and manufacture of marijuana sufficient to withstand defendants' motions and leave to the jury the question of defendants' guilt.

Pursuant to G.S. 90-95(a)(1), an accused has possession of marijuana when he has both the power and intent to control its disposition. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977). Possession may be either actual or constructive. Constructive possession exists when an accused, though not having actual control and dominion over the marijuana, has the intent and capability of having such control and dominion. *Id.* Our courts have articulated the rule that contraband found on premises under the control of the accused may give rise to an inference of knowledge and possession sufficient to carry the case to the jury on the question of unlawful possession. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Wiggins*, *supra*. In light of these principles, we hold that the jury was properly allowed to consider and render a verdict on the question of defendants' possession. The evidence here showed that defendants had control over the land and by inference over the plants grown thereon.

We reach the same conclusion on the question of defendants' felonious manufacture. The term "manufacture" under G.S. 90-95(a)(1) is defined in G.S. 90-87(15), in pertinent part, as "the production, preparation, propagation, compounding, conversion, or

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processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally . . ." The State's evidence, which showed that at least thirty-nine marijuana plants were being grown in a cornfield farmed by defendants was sufficient to support a conviction of intent to manufacture and of manufacturing marijuana. See *State v. Wiggins, supra*; *State v. Elam*, 19 N.C. App. 451, 199 S.E. 2d 45, cert. denied and appeal dismissed, 284 N.C. 256, 200 S.E. 2d 656 (1973).

[4] The next assignment of error we consider concerns the trial court's denial of defendants' motion to discover the identity of the confidential informant who told the police of the marijuana being grown. We find no error in the trial court's ruling. A defendant is not entitled to elicit the name of a confidential informant unless such disclosure is essential to a fair trial. *State v. Cherry*, 55 N.C. App. 603, 286 S.E. 2d 368, review denied, 305 N.C. 589, 292 S.E. 2d 572 (1982). Defendants have not demonstrated the necessity of such disclosure.

[5] We next consider defendant Mack Perry's contention that the trial court erred in denying his motion for a separate trial. We find no error. The trial court acted within its discretion in consolidating for trial the cases of defendants, charged with the same offenses arising from the same set of circumstances. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976), reconsideration denied, 293 N.C. 259, 243 S.E. 2d 143 (1977).

We group together defendants' last several assignments of error which concern evidentiary rulings by the trial court.

[6] We find no merit in defendants' first evidentiary assignment of error concerning the trial court's decision to admit Sheriff Terry's testimony about the marijuana, its value, weight, and the stages involved in its growth and harvest. Defendants contend that Terry's testimony should have been excluded since the witness was not qualified as an expert on marijuana. Although the trial court made no findings as to Terry's qualifications as an expert, in the absence of a special request by the defense, such a finding is deemed implicit in the trial court's admission of the challenged testimony. *State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982). To challenge the proffered testimony on appeal, defense counsel should have made a special request to have Terry qualified as an expert. Defense counsel's general objection at trial to

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the content of Terry's testimony was insufficient to preserve the matter for our review. *Id.*; *State v. Edwards and State v. Nance*, 49 N.C. App. 547, 272 S.E. 2d 384 (1980).

[7] Defendants' next assignment of error concerns the trial court's admission into evidence, over defense counsel's objection, photographs of the marijuana plants and the cornfield where they were found growing. We find no error in the admission of these photographs which the record shows were used to illustrate Sheriff Terry's testimony. *See* G.S. 8-97.

Defendants next contend that the trial court erred by excluding questions by defense counsel during cross-examination of Sheriff Terry. Because the record on appeal fails to indicate how the witness would have answered had he been permitted, we overrule this assignment of error. Without a proposed answer in the record, it is impossible to determine whether the exclusion thereof constituted prejudicial error. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972).

Defendants' next contention concerns defense counsel's attempt to introduce into evidence income tax returns of defendant, Wesley Perry. We fail to see how this evidence is relevant on the question of defendant's guilt under G.S. 90-95. *See* G.S. 8C-1, Rule 401. We, therefore, overrule defendants' contention that the trial court's exclusion of this evidence constituted prejudicial error.

[8] Defendants next contend that the trial court erred in excluding testimony from one of their witnesses intended to impeach State's witness, Rita Perry, who had testified earlier. The testimony sought pertained to a shoplifting incident in which Ms. Perry, during earlier cross-examination, had denied any involvement. Because the shoplifting incident was wholly collateral to the issue at trial, defense counsel was bound by Ms. Perry's answers and the trial court was correct in excluding testimony seeking to show the contrary. *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973); *See* G.S. 8C-1, Rule 608.

Defendants' contention that they were prejudiced by their inability to cross-examine Sheriff Terry regarding defendant Mack Perry's knowledge of marijuana is overruled. Defendants cite no exception or assignment of error and, thus, this issue merits no

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review. Rule 10(a); Rules of Appellate Procedure; *State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980).

We find no merit in defendants' final evidentiary objection that they were prejudiced by the State's cross-examination of defendant, Dan Perry, as to how often he went to the cornfield where marijuana was growing. We find no abuse of discretion nor resulting prejudice to defendants from the trial court decision to admit such testimony. See *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, cert. denied, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982); G.S. 8C-1, Rule 611(b).

Defendants received a fair trial. We find no error in the judgment and commitment of defendants.

No error.

Judges HEDRICK and WELLS concur.

LARRY EARL BUFFINGTON v. MARSHA R. BUFFINGTON

No. 8321DC978

(Filed 3 July 1984)

1. Appeal and Error § 6.2— all issues not determined—substantial right affected—appeal proper

Where the trial court by its rulings necessarily determined that the parties' separation agreement was valid as a matter of law and that defendant's counterclaim for equitable distribution should therefore be denied, and the only issues left remaining for trial were those relating to plaintiff's claim for specific performance of the separation agreement or, alternatively, damages for breach, the trial court's orders did not constitute a final judgment as they did not dispose of all issues as to all the parties in the lawsuit; however, defendant could properly appeal since an order which completely disposes of one of several issues in a suit affects a substantial right, and the trial court's order also affected a substantial right of defendant by preventing adjudication of defendant's counterclaim and plaintiff's claims in a single lawsuit.

2. Husband and Wife § 10.1— property settlement—time of separation irrelevant

By the enactment of G.S. 50-20(d) the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage in order for a property settlement to be effective between spouses, and the public policy of our state permits spouses to execute

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a property settlement at any time, regardless of whether they separate immediately thereafter or not; therefore, defendant could not avoid her separation agreement solely on the grounds that she continued to live with plaintiff for 18 days after the agreement was signed.

3. Divorce and Alimony § 21.9— valid property settlement—no equitable distribution of property

A request for equitable distribution of property may not be granted in the face of a prior valid agreement disposing of the parties' marital property.

APPEAL by defendant from *Harrill, Judge*. Order entered 13 June 1983 in FORSYTH County District Court. Heard in the Court of Appeals 6 June 1984.

Plaintiff and defendant were married on 13 June 1970 in Harrisburg, Pennsylvania and later moved to Winston-Salem, North Carolina. The parties experienced marital difficulties and executed a separation agreement disposing of their property on 12 November 1981. After signing the agreement, the parties continued to live together in the marital home until 30 November 1981, when the defendant moved out.

Thereafter, defendant refused to comply with the terms of the agreement and plaintiff filed suit on 10 December 1982, seeking a divorce and specific performance of the separation agreement or, alternatively, damages for breach of the agreement. In her answer, defendant admitted that grounds existed for a divorce based on one year's separation under N.C. Gen. Stat. § 50-6 (1983 Supp.), but contended that the separation agreement was invalidated by her continued cohabitation with plaintiff for 18 days after execution of the agreement. Defendant counterclaimed for an order declaring the separation agreement void, and for equitable distribution of the parties' marital property pursuant to N.C. Gen. Stat. § 50-20 (1983 Supp.).

On 31 January 1983, the parties were granted an absolute divorce and in May, 1983, both plaintiff and defendant moved for summary judgment on defendant's counterclaims. Following a hearing on 6 June 1983, the trial court denied defendant's motion for summary judgment on her counterclaim. The court then granted plaintiff's motion for summary judgment as to defendant's counterclaim.

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From entry of the order denying defendant's motion and granting plaintiff's motion for summary judgment, defendant appealed.

Morrow and Reavis, by John F. Morrow and Clifton R. Long, Jr., for plaintiff.

Barbara C. Westmoreland for defendant.

WELLS, Judge.

Defendant's appeal raises for the first time the question whether the passage of the Equitable Distribution Act, which permits property settlements executed "[b]efore, during or after marriage," alters our state's former public policy, expressed in the prior decisional law of this state, which permitted such agreements only where the parties had already separated or separated immediately after execution of the agreement.

[1] Before determining whether the trial court's summary judgment orders were correct, we examine the procedural status of defendant's appeal. As a general rule, a party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E. 2d 446 (1981), N.C. Gen. Stat. § 1-277 (1983), § 7A-27(d) (1981). The purpose of the substantial right doctrine is to prevent fragmentary or premature appeals, by permitting the trial division to have done with a case fully and finally before it is presented to the appellate division, *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983).

In ruling on the parties' summary judgment motions, the trial judge noted that "... the record fails to establish any genuine issue of material fact that would support the legal conclusion that the separation agreement of the parties ... is not valid as to the division of the property of the parties" By its rulings, the trial court necessarily determined that the separation agreement was valid as a matter of law and that defendant's counterclaim for equitable distribution should therefore be denied. The only issues left remaining for trial were those relating to plaintiff's claim for specific performance of the separation agreement, or, alternatively, damages for breach. The trial court's

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orders did not constitute a final judgment as they did not dispose of all issues as to all the parties in the lawsuit, *Roberts v. Heffner, supra*. However, it has been held that an order which completely disposes of one of several issues in a suit affects a substantial right, *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The trial court's order also affects a substantial right of defendant by preventing adjudication of defendant's counterclaim and plaintiff's claims in a single lawsuit, see *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975), Comment, "Interlocutory Appeals in North Carolina: The Substantial Right Doctrine," 18 Wake Forest L. Rev. 857 (1982).

In considering defendant's appeal, we also note that defendant has violated Rule 10 of the Rules of Appellate Procedure by failing to include in the record on appeal proper exceptions following the record of judicial action to which they are addressed, and by failing to include a plain, concise statement of the basis of her assignments of error at the close of the record on appeal. Normally, appellate review is limited to those exceptions set out and made the basis of assignments of error in accordance with Rule 10. Nevertheless, because of the importance of the issues presented by defendant's appeal, we exercise our discretion under Rule 2 of the Appellate Procedure and consider the appeal despite its procedural defects.

We turn now to the merits of defendant's appeal, to determine if the trial court correctly determined that no genuine issues of material fact remained for trial and that plaintiff was entitled to judgment as to defendant's counterclaim, as a matter of law. Defendant sought an equitable distribution of the parties' marital property on the grounds that the separation agreement was invalidated when defendant and plaintiff lived together for 18 days after its execution. Under the common law of our state, courts generally refused to uphold a property settlement contingent upon divorce if the parties were living together at the time of its execution and had no intent of separating immediately thereafter, see 2 R. Lee, *North Carolina Family Law* § 188 (4th ed. 1980), and cases cited therein. Such agreements were thought to facilitate divorce by guaranteeing the spouses certain property upon dissolution of the marriage. *Id.* Antenuptial agreements regulating the parties' property rights *during* marriage, on the

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other hand, have long been permitted in our state, *see* N.C. Gen. Stat. § 52-10(a) (1983 Cum. Supp.), *Lee, supra* at § 181.

Plaintiff contends, however, that our former public policy was modified by the enactment of G.S. § 50-20(d), which provides:

Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

Defendant argues that G.S. § 50-20(d) did not change public policy because the statute refers to G.S. § 52-10 and G.S. § 52-10.1, which prohibit separation agreements contrary to public policy.¹

In interpreting statutory language, the duty of the court is to effectuate the intent of the legislature, *Newlin v. Gill*, 293 N.C. 348, 237 S.E. 2d 819 (1977). In ascertaining the legislative intent, it is presumed that the legislature acted with full knowledge of prior and existing law, *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). A statute should be considered as a whole and none of its provisions construed in a way that would render them useless or redundant if they can reasonably be considered as adding

1. § 52-10. *Contracts between husband and wife generally; releases.*—

Contracts between husband and wife not forbidden by G.S. 52-6 and *not inconsistent with public policy* are valid, and any persons of full age about to be married, and, subject to G.S. 52-6, any married persons, may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released.

§ 52-10.1. *Separation agreements; execution by minors.*—

Any married couple, both of whom are 18 years of age or over, is hereby authorized to execute a separation agreement which shall be legal, valid, and binding in all respects as if they were both 21 years of age, provided, that if either the husband or the wife, or both, are under the age of 21 years, the separation agreement must be acknowledged by the husband before a clerk of the superior court and executed by the wife before a clerk of the superior court in conformity with G.S. 52-6.

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meaning to the act in harmony with its purpose, *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

[2] Applying these rules to the case before us, we hold that by the enactment of G.S. § 50-20(d), the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage in order for a property settlement to be effective between spouses. Defendant argues that the legislature inserted clear language permitting separation agreements "[b]efore, during or after marriage" in the first part of G.S. § 50-20(d), only to take it out in the next clause by a reference to G.S. §§ 52-10 and 52-10.1. Such an interpretation runs counter to the rules of statutory construction and common sense. We hold that the public policy of our state, as expressed by G.S. § 50-20(d), permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not. It follows that defendant cannot avoid her separation agreement solely on the grounds that she continued to live with plaintiff for 18 days after the agreement was signed.

[3] Turning to defendant's motion for summary judgment on her counterclaim for equitable distribution, we hold that summary judgment was properly granted. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure. The burden of proof rests upon the movant. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). A request for equitable distribution of property may not be granted in the face of a prior, valid agreement disposing of the parties' marital property, G.S. § 50-20(d). Therefore, summary judgment in favor of defendant's claim for equitable distribution would be improper unless defendant showed that no valid property settlement existed, no material issues of fact remained concerning her right to equitable distribution, and that she was entitled to equitable distribution as a matter of law. The material facts are not in dispute and defendant has failed to show that she is entitled to equitable distribution as a matter of law. Defendant attacks the separation agreement solely on the ground that it was invalidated by her cohabitation with plaintiff for 18 days after execution of the agreement. Based on our foregoing

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discussion of the law concerning the validity of property settlements agreements contingent upon divorce, it is clear that the trial court correctly concluded that defendant was not entitled to equitable distribution as a matter of law.

We hold the trial court also correctly granted plaintiff's motion for summary judgment as to defendant's counterclaim, leaving for trial only plaintiff's claim for specific performance or, alternatively, damages for breach of the separation agreement.

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

HAZEL M. HARDEN, PLAINTIFF v. ELLA MARSHALL, DEFENDANT v. ALAMANCE COUNTY AND JOHN STOCKARD, SHERIFF OF ALAMANCE COUNTY, ADDITIONAL DEFENDANTS

No. 8315DC950

(Filed 3 July 1984)

1. Taxation § 45— tax foreclosure proceeding—land conveyed by sheriff's deed

Where the orders, notices and sheriff's deed in a tax foreclosure proceeding described a vacant lot by metes and bounds and by reference to a recorded map which did not include an adjoining lot containing a house, only the vacant lot was conveyed by the sheriff's deed notwithstanding the notice of sale also referred to a tax map which contained a description of both lots.

2. Taxation § 45— tax foreclosure proceeding—test for determining land conveyed

The test for determining whether a vacant lot and a lot containing a house or only the vacant lot were conveyed in a tax foreclosure proceeding was whether the papers filed in the proceeding conveyed the lot containing the house and not prejudice to the delinquent taxpayer by the description used.

3. Taxation § 45— tax foreclosure proceeding—no immaterial irregularity

The sale of a sufficiently described lot in a tax foreclosure proceeding is not an immaterial irregularity which may be corrected under G.S. 105-394 by holding that another lot was also sold under the proceeding.

4. Taxation § 45— tax foreclosure proceeding—unambiguous description in sheriff's deed—reference to another deed

Where a sheriff's deed in a tax foreclosure proceeding contained an unambiguous description of a vacant lot, such description could not be changed by

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reference to another deed which also conveyed an adjoining lot containing a house.

5. Taxation § 45— tax foreclosure proceeding—no estoppel to assert ownership of land purportedly conveyed

Defendant taxpayer was not estopped to assert ownership of a house and lot purportedly sold to plaintiff and her husband in a tax foreclosure proceeding, although she may have thought the house and lot had been conveyed in the proceeding, where the orders, notices and sheriff's deed actually conveyed only an adjoining vacant lot, and plaintiff and her husband were not induced to do anything by defendant's actions.

APPEAL by defendant Ella Marshall from *Allen (J. B.), Judge*. Judgment entered 18 May 1983 in District Court, ALAMANCE County. Heard in the Court of Appeals 5 June 1984.

This action grew from a foreclosure for taxes. Ella Marshall owned two adjoining lots which were listed for taxes as one lot. The deeds to Ella Marshall which conveyed the two lots to her were recorded on 8 June 1956, one of the deeds being recorded in Deed Book 244, pages 439-440 and the other being recorded in Deed Book 244, pages 440-442. The two lots were shown on the tax maps of Alamance County from 1948 until the time this action was tried as Tax Map 160, Block 650, Lot No. 112. A house was constructed on one of the two lots.

A judgment was docketed against Ella Marshall on 19 February 1973 for Alamance County ad valorem taxes for the years 1967 to 1972 in the amount of \$174.93 plus costs of \$2.00. The Clerk of Superior Court on 5 October 1973 ordered the Sheriff to sell property of Ella Marshall to satisfy the judgment against her. The order of execution described the lot to be sold by a metes and bounds description and also as Lot No. 86 on a map recorded in Plat Book 3 at page 95 in the Office of the Register of Deeds. At the end of the description, a reference was made to "Alamance County Tax Map 160-650-112." The lot described by metes and bounds and by reference to a map in the Office of the Register of Deeds of Alamance County is not the lot on which the house was built but is the vacant adjoining lot. The Sheriff advertised the sale using the description that was in the order of execution. Thomas R. Harden, Jr. and his wife, Hazel Harden, bought the property at the execution sale for \$1,400.00. The Sheriff on 19 November 1983 delivered a deed to the Hardens in which the property was described as it had been described in the order of

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execution. There was no reference to the tax map but the deed said: "For more particular description, see deed from Clarence Ross Executor to Ella Marshall, recorded in Deed Book 244, Page 440, in the Office of the Register of Deeds in Alamance County." This sale was confirmed.

The defendant continued to occupy the house and paid rent to Mr. and Mrs. Harden until Mr. Harden's death, and to Mrs. Harden after that time. Mr. and Mrs. Harden made improvements on the house. The plaintiff paid the taxes, maintenance costs, and insurance premiums on the house from 1973 until this action was commenced. The defendant stopped paying rent after August 1982 and the plaintiff filed an action seeking summary ejectment. The defendant filed an answer in which she denied the plaintiff's title and the action was transferred to district court. The Sheriff and Alamance County were then made parties. During the pendency of the action, and on 7 October 1982, the Sheriff delivered to plaintiff what was denominated as a Deed of Correction which was recorded on that date. This deed recited that the Sheriff had intended to convey both lots by his deed dated 19 November 1973. The Deed of Correction purported to correct the description in the Sheriff's previous deed and convey to the plaintiff the lot on which the house was constructed as well as the adjoining lot.

The case was tried by the court without a jury. The court found as a fact that the notices of sale in the tax foreclosure referred to the Tax Map 160-650-112 which description included the lot upon which the house was located as well as the adjoining vacant lot. It found further that Mrs. Marshall, all officials of Alamance County, the Tax Collector, and the Sheriff knew or should have known that the property to be sold included the lot upon which the house was located as well as the adjoining vacant lot. It also found that the Sheriff's deed was intended to convey both lots but by error the description of the lot on which the house was located was omitted and a "corrective deed" had been prepared pursuant to G.S. 105-394 and delivered to the plaintiff. The court concluded that the plaintiff is the owner of both lots and ordered that the plaintiff have possession of both lots. The defendant appealed.

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Grady Joseph Wheeler, Jr. for plaintiff appellee.

North State Legal Services, Inc., by Philip A. Lehman, for defendant appellant.

WEBB, Judge.

[1] The first question posed by this appeal is whether the lot on which the house is constructed was sold by the Sheriff on 19 November 1973. We hold that it was not. The orders, notices, and Sheriff's deed described a lot by metes and bounds and by reference to a map recorded in the Register of Deeds' Office which does not include the lot upon which the house is constructed. If there was not a sufficient description in the proceedings, we might look to the tax map for help but this is not the case. The description is sufficient and it does not include the lot on which the house is located. The plaintiff, relying on G.S. 105-375(b), argues that the statute requires that when the Tax Collector files a certificate for back taxes with the Clerk of Superior Court that it contain a "description of the property sufficient to permit its identification by parol testimony." She says this permits parol testimony to permit identification of the property. If the description were ambiguous, parol testimony might be appropriate. We do not believe the description is ambiguous.

[2] The plaintiff also argues that the defendant was not prejudiced by the description used. She contends that the defendant has not paid any taxes on the property since 1967, that she was told by the Tax Collector that her house and lot would be sold, and it brought a price within the range of its appraised value. We do not believe prejudice to the defendant is the test. The test is whether the papers filed in the proceedings conveyed the lot on which the house was constructed and we hold they do not.

[3] The plaintiff contends further that G.S. 105-394 is applicable to this case which provides in part:

"Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, ap-

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praisal, assessment, levy, collection, or any other proceeding under this Subchapter:

The following are examples of immaterial irregularities:

. . . .

- (5) Any defect in the description upon any abstract, tax receipt, tax record, notice, advertisement, or other document, of real or personal property, if the description be sufficient to enable the tax collector or any person interested to determine what property is meant by the description. (In such cases the tax supervisor or tax collector may correct the description on the documents bearing the defective description, and the correct description shall be used in any documents later issued in tax foreclosure proceedings authorized by this Subchapter.)"

The plaintiff contends that under this section the description used was an immaterial irregularity which may be corrected. We do not believe the sale of a sufficiently described lot in a foreclosure proceeding is an immaterial irregularity which may be corrected by holding another lot was sold under the proceedings.

The plaintiff relies on *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E. 2d 464 (1963) for the proposition that a map or plat referred to in a deed becomes a part of the deed whether or not the map is registered. That case dealt with a deed which referred to a map of the Highway Commission and said "'(s)o much of said property as lies within the bounds of the right of way of Wilkinson Boulevard is subject thereto.'" *Id.* at 598, 133 S.E. 2d at 465. The Court said this was notice to the grantees that the Highway Commission claimed the land as shown on the map as a right-of-way. We do not believe this case is precedent for holding that in proceedings which describe a lot by metes and bounds and by reference to a recorded plat that a reference to a tax map changes the description. The plaintiff also relies on *Crews v. Crews*, 210 N.C. 217, 186 S.E. 156 (1936) and *Ferguson v. Fibre Co.*, 182 N.C. 731, 110 S.E. 220 (1921). *Crews* deals with the reformation of a deed of trust and a deed on the ground of a mistake by the draftsman. We do not believe this has any application to a judicial proceeding. *Ferguson* deals with the interpretation of a

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description in a deed. There is no reference in that case to anything outside the deed.

[4] The plaintiff argues that the Sheriff's deed of 19 November 1973 conveyed both lots because it referred to a deed recorded in Book 244, page 440 which deed conveyed the lot upon which the house is located. We have held that the Sheriff was ordered to convey the vacant lot. He could not under that order convey a separate lot. Nevertheless, we do not believe the Sheriff's deed purported to convey the lot upon which the house is located. It contains a description which without ambiguity describes the vacant lot. This description cannot be changed by reference to another deed. We do not believe any of the cases cited by the plaintiff, *Carroll v. Industries, Inc.*, 37 N.C. App. 10, 245 S.E. 2d 204, *aff'd*, 296 N.C. 205, 250 S.E. 2d 60 (1978); *Lee v. McDonald*, 230 N.C. 517, 53 S.E. 2d 845 (1949); *Hudson v. Underwood*, 229 N.C. 273, 49 S.E. 2d 508 (1948); *Chatham v. Chevrolet Co.*, 215 N.C. 38, 1 S.E. 2d 117 (1939); *Mitchell v. Heckstall*, 194 N.C. 269, 139 S.E. 438 (1927); *Berry v. Cedar Works*, 184 N.C. 187, 113 S.E. 772 (1922); or *Gudger v. White*, 141 N.C. 507, 54 S.E. 386 (1906), are inconsistent with this principle.

The plaintiff pleads the statute of limitations and contends the defendant is barred from contesting the tax sale. The defendant is not contesting the tax sale. Her contention is that the tax sale did not convey the lot in question. We hold she is correct in this contention.

The plaintiff next contends that the Sheriff's Deed of Correction of 7 October 1982 conveyed the title to the lot upon which a house is located. We have held that the Sheriff was ordered to convey the vacant lot. He had no power to convey the lot with the house upon it.

[5] Lastly, the plaintiff contends the defendant is estopped to assert her ownership of the house and lot. She says that the defendant knew her land was being sold and even told the Tax Collector to sell the land. Relying on *Sherrill v. Sherrill*, 73 N.C. 8 (1875), she says that an owner of property who stands by and sees a third person sell it under claim of title without asserting her own title or giving the purchaser any notice thereof, is estopped against such purchaser from afterwards asserting title. In *Sherrill* the person whose heirs were estopped induced the plaintiff to

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take a tract of land by deed from a third party. In this case the defendant did nothing to mislead the purchasers. We do not believe the plaintiff or her husband were induced to do anything by the actions of the defendant. Estoppel does not apply.

We hold it was error not to enter judgment for the defendant. The decision of this case should not affect any claim the plaintiff may have for unjust enrichment.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ODELL HOCKETT, JR.

No. 8312SC703

(Filed 3 July 1984)

1. Robbery § 4.5— armed robbery—aiding and abetting—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that defendant was present when a companion requested another person to take them to get some money and drugs and that he directed the driver of the getaway car to park facing out toward the street; defendant waited in the car while two of his companions went into a convenience store; defendant knew that a robbery was being contemplated and was taking place while he waited in the getaway car; and defendant accepted his share of the robbery proceeds without protest.

2. Robbery § 5.6— aiding and abetting—instructions proper

There was no merit to defendant's contention in an armed robbery case that the trial court's instructions on aiding and abetting were incomplete because the trial judge failed to include a requested portion of the N.C. Pattern Jury Instruction on "mere presence," since the instructions given fully expressed the recognized legal principle that presence alone is not sufficient to support a conviction for aiding and abetting, but presence, actual or constructive, coupled with some act in furtherance of the crime, as in this case, may constitute aiding and abetting.

APPEAL by defendant from *Farmer, Judge*. Judgment entered 1 February 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 February 1984.

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Defendant was tried for armed robbery. The jury returned a verdict of guilty as charged. From a conviction and sentence of fourteen years imprisonment, defendant appeals.

Attorney General Rufus L. Edmisten, by Associate Attorney General Thomas J. Ziko, for the State.

Office of the Public Defender, by Assistant Public Defender John G. Britt, Jr., for defendant appellant.

JOHNSON, Judge.

On 20 May 1982, three men, James Lorenzo Smith, David Wright, a/k/a Ace, and Odell Hockett, Jr., the defendant, asked Alexander Artis to take them to get some money and drugs. Artis, pursuant to Ace's instruction, drove the three men to the apartment complex located behind the Kwik Mart, a convenience store.

When they arrived at the apartment complex, defendant directed Artis to park the car so that the front faced the street. After Artis parked the car Smith, Ace, and defendant got out of the car and walked around to the back. Once they were behind the car, Ace handed Smith a gun and said to him, "[y]ou take this gun and you better go in the store and get the money." Following this exchange, defendant returned to the car and got in with Artis. Smith and Ace went up the stairway which led to the apartments. While Ace waited outside the Kwik Mart, Smith went inside and robbed the cashier of \$27.00. Thereafter, Smith and Ace returned to the car, where Smith handed the gun back to Ace. Artis drove the three men to a house where they divided the proceeds of the robbery.

At the close of the State's evidence, defendant's motion to dismiss was denied. Defendant offered no evidence.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge on the ground of insufficiency of evidence. He argues that presence at the scene of the crime, without more, is not sufficient to withstand a motion for nonsuit.

On a motion to dismiss, the question presented is whether there is substantial evidence of each essential element of the of-

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fense charged, or lesser offense included, and of defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1974). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable in-tendment and every inference therefrom. *State v. Earnhardt*, *supra*; *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

In order to sustain the defendant's conviction, the State was required to present evidence which proved each of the essential elements of the offense with which he was charged. These are: (1) that defendant was actually or constructively present during the crime; (2) that defendant intended to aid the perpetrators in the commission of the offense should his assistance be necessary; and (3) that such intent was communicated to the actual perpetrator. *State v. Sanders*, 288 N.C. 285, 290-291, 218 S.E. 2d 352, 357 (1975); *State v. Pryor*, 59 N.C. App. 1, 5-6, 295 S.E. 2d 610, 614 (1982); *State v. Edwards*, 49 N.C. App. 547, 560, 272 S.E. 2d 384, 393 (1980). Defendant first contends that there was no evidence that he was present with the intent to aid the perpetrator. He argues that he did not by word or conduct encourage the perpetrator in the commission of the crime, nor did he communicate to the perpetrator that he would lend assistance should it become necessary.

It is well recognized that intent to aid and the communication of intent to aid need not be shown by express words of the defendant, but may be inferred from his actions and relations to the actual perpetrators. *State v. Sanders*, *supra* at 291, 218 S.E. 2d at 357; *State v. Pryor*, *supra* at 6, 295 S.E. 2d at 614. The evidence shows that defendant was present when Ace requested Artis to take them to get some money and drugs and that he directed Artis to park the car facing out toward the street. Defendant waited in the car, while Ace accompanied Smith to Kwik Mart. After the robbery, defendant accepted his share of the proceeds without protest.

Based on these facts, the jury could infer that defendant, by waiting with Artis, who was not a party to the robbery, placed

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himself in a position to aid in the commission of the crime if it became necessary. Indeed, by remaining with Artis, defendant did in fact aid in the successful commission of the crime since he insured that Artis would provide the actual perpetrator with a means to leave the scene once the robbery was committed.

Defendant also argues that the evidence does not establish that he knew the robbery was contemplated. There is uncontroverted evidence in the record, which need not be restated here, that defendant knew that the robbery was contemplated. There is also ample evidence in the record that defendant knew the robbery was taking place while he waited in the getaway car.

The evidence adduced at trial and the inferences drawable therefrom clearly establish that the defendant was so situated as to be able to aid Smith and Ace if necessary, and this intent to aid was communicated to Smith, the perpetrator. Accordingly, we hold that this assignment of error is without merit.

[2] In his final assignment of error defendant contends that the court erred in failing to give the requested portions of the North Carolina Pattern Jury Instruction. He argues that the court's instructions on aiding and abetting were incomplete because the trial judge failed to include the following instruction on "mere presence":

However, a person is not guilty of a crime merely because he is present at the scene, even though he might (sic) silently approve of the crime or secretly intend to assist in its commission. To be guilty he must aid or actively encourage the person committing the crime, or in some way communicate to this person his intention to assist in its commission.

The defense's theory in this case was that although the defendant was constructively present at the scene of the crime, he did not know a robbery was contemplated, nor did he in any way encourage or assist the perpetrator in the commission of the crime.

It is well settled that mere presence by the defendant at the scene of the crime is not sufficient in and of itself to establish guilt as aider and abettor. *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967). However, a person may be guilty as an aider and abettor if that person,

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accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense.

State v. Price, 280 N.C. 154, 158, 184 S.E. 2d 866, 869 (1971); *State v. Pryor*, *supra* at 7, 295 S.E. 2d at 615.

In determining whether the trial court erred in failing to give the requested instructions, we must consider the instructions given in their entirety. *State v. Wright*, 302 N.C. 122, 273 S.E. 2d 699 (1981). Here, the trial court's instructions insofar as applicable are as follows:

Now, a person may be guilty of robbery with a firearm although he personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit robbery with a firearm is guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of robbery with a firearm just as if he had personally done all the acts necessary to constitute that crime.

Now, I charge that for you to find the Defendant guilty of robbery with a firearm because of aiding and abetting, the State must prove beyond a reasonable doubt the following things: First, that a robbery with a firearm was committed by Lorenzo Smith. Now, to determine whether or not Lorenzo Smith committed robbery with a firearm, you must find beyond a reasonable doubt that Lorenzo Smith took property from the person of Karyl Zowe or in her presence, and further, that Lorenzo Smith carried away that property, and that Karyl Zowe did not voluntarily consent to the taking and carrying away of that property, and further, that at the time of the taking, Lorenzo Smith intended to deprive Karyl Zowe of its use permanently, and further, that Lorenzo Smith knew he was not entitled to take the property, and further, that Lorenzo Smith had a firearm in his possession at the time he obtained the property, and further, that Lorenzo

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Smith obtained the property by endangering or threatening the life of Karyl Zowe with a firearm.

And the second thing the State must prove to you beyond a reasonable doubt is that Defendant, Odell Hockett Jr., knowingly advised or instigated or encouraged or aided Lorenzo Smith to commit that crime. So I charge that if you find from the evidence beyond a reasonable doubt that on or about May 20, 1982, Lorenzo Smith committed robbery with a firearm and that the Defendant aided or encouraged or advised or instigated and that in so doing, the Defendant knowingly did those things, that he knowingly advised, instigated, encouraged or aided Lorenzo Smith to commit the crime of robbery with a firearm, it would be your duty to return a verdict of guilty in this case, guilty of robbery with a firearm. However, if you do not so find or if you have a reasonable doubt as to one or more of those things, it would be your duty to return a verdict of not guilty in this case.

Taken as a whole, these instructions fully express the recognized legal principle that presence alone is not sufficient to support a conviction for aiding and abetting. However, presence, actual or constructive, coupled with some act in furtherance of the crime, as in this case, may constitute aiding and abetting. Since the State relied on the theory that defendant knowingly encouraged and assisted in the commission of the crime, the requested portions were correctly excluded. N.C.P.I. 202. 20A, n. 3. Although we disagree with the State's conclusion that the giving of the requested instructions would have been prejudicial to the defendant, we find that the instructions given were more than adequate.

No error.

Chief Judge VAUGHN and Judge WEBB concur.

Barrino v. Radiator Specialty Co.

EARL J. BARRINO, ADMINISTRATOR OF THE ESTATE OF LORA ANN BARRINO v. RADIATOR SPECIALTY COMPANY

No. 8326SC753

(Filed 3 July 1984)

Master and Servant § 87— workers' compensation—alleged intentional acts—common law action precluded

Plaintiff's acceptance of workers' compensation benefits for the death of an employee precluded plaintiff from seeking additional compensation in a common law action based upon alleged willful and intentional acts by defendant employer. Furthermore, even if plaintiff was not precluded from bringing an action based on intentional acts, plaintiff's allegations demonstrated only gross negligence by defendant with regard to the protection of its employees and failed to show an actual intent to injure the deceased employee.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 23 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1984.

Prior to her death, Lora Ann Barrino was an employee at defendant's manufacturing plant in Indian Trail, North Carolina. Plant operations generally involved the handling and processing of volatile, flammable liquids and gases. On 26 November 1980, an explosion and fire occurred at the plant causing decedent to sustain second and third degree burns over seventy percent of her body. These burns resulted in her death on 10 December 1980. Decedent was subsequently paid benefits under the North Carolina Workers' Compensation Act.

Plaintiff, who is decedent's father and administrator of her estate, filed this action on 24 November 1982 to recover for the injuries and death of decedent. Plaintiff contended that the explosion was the result of defendant's willful and intentional misconduct. Defendant answered, claiming that the acceptance of Workers' Compensation benefits was an absolute bar to all other remedies under G.S. 97-10.1, and moved for summary judgment on 22 February 1983. From the granting of this motion by the trial court, plaintiff appeals.

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Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, by Melvin L. Watt, for plaintiff appellant.

Golding, Crews, Meekins, Gordon and Gray, by James P. Crews and Henry C. Byrum, Jr., and Weinstein, Sturges, Odom, Groves, Bigger, Jonas and Campbell, by John J. Doyle, Jr., for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment in that defendant's conduct amounted to an intentional tort, which would enable plaintiff to seek a civil recovery in addition to the Workers' Compensation benefits previously awarded. We disagree with this contention and affirm the order of the trial court.

The North Carolina Workers' Compensation Act provides that:

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death. G.S. 97-10.1.

Plaintiff argues, however, that where an employee is injured by the employer's intentional act the immunity from suit provided by G.S. 97-10.1 is not applicable. *Essick v. City of Lexington*, 232 N.C. 200, 60 S.E. 2d 106 (1950). For plaintiff to recover legal damages against defendant, then, according to plaintiff, there must be a showing that decedent was intentionally injured by defendant.

Plaintiff contends that the acts of defendant were willful, wanton, malicious and intended, thereby justifying the application of the exception to the exclusivity clause of G.S. 97-10.1. The misconduct complained of, as alleged by plaintiff in his complaint, consisted of the following acts:

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1. covering meters designed to detect dangerous gas and vapor levels in defendant's plant with plastic bags to render them inoperative;
2. turning off, on the day of the explosion, alarms designed to warn of dangerous gas and vapor levels in defendant's plant, and instructing employees to continue or to resume working despite the alarms;
3. installing and operating equipment used in storing and handling explosive gas without the inspections and approvals required by law;
4. using equipment which lacked explosion-proof safeguards to prevent sparks in an explosion-prone atmosphere in violation of the National Electrical Code and the Occupational Safety and Health Act of North Carolina; and
5. in general, failing to provide a safe work place.

Even when considered in the light most favorable to plaintiff, these allegations of misconduct do not establish an intentional act sufficient to remove the protection afforded defendant by G.S. 97-10.1. Although the allegations, which are denied by defendant, may, if true, demonstrate that defendant was grossly negligent with regard to the protection of its employees, there has been no showing of an "actual intent" to injure decedent. See *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E. 2d 582 (1982).

Since there was no showing that defendant intended to injure decedent, we find no substance in plaintiff's attempt to avoid a claimed exclusivity provision of G.S. 97-10.1. Moreover, the case of *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1951), seems indistinguishable from the case at bar. In *Warner* the plaintiff contended that although he had received compensation he should be able to sue the defendant because defendant was guilty of willful and wanton conduct. In that case our Supreme Court held that since it was admitted that plaintiff had applied for and received compensation under the Workmen's Compensation Act the acceptance of benefits under the Act ". . . forecloses the right of the employee to maintain a common law action, under the exception pointed out, against the employer. . . ." *Id.* at 733, 69 S.E. 2d at 10.

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Plaintiff has already been compensated by the payment of Workers' Compensation benefits and may not now maintain a separate action against defendant for additional compensation. The trial court's order granting defendant's motion for summary judgment is

Affirmed.

Judge WEBB concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

As was recognized by our Supreme Court in *Essick v. City of Lexington*, 232 N.C. 200, 60 S.E. 2d 106 (1950), an employer's immunity from suit for *intentional* injuries is no part of the bargain that is our Workers' Compensation Act. As numerous other decisions of that Court and this have intimated, the only rights against their employers that employees surrendered by the enactment of Workers' Compensation was the right to sue for negligently caused injuries. See *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886 (1953); *Lee v. American Enka Corporation*, 212 N.C. 455, 193 S.E. 809 (1937). Which is as it should be, in my opinion, and since the plaintiff's complaint alleges an intentional tort that resulted in a young woman's death, it was error, I believe, to dismiss the case by summary judgment. The judgment is based only upon the pleadings and plaintiff's admissions that decedent was employed by defendant and Workers' Compensation benefits were applied for and received; none of which showed either that plaintiff's allegations cannot be proved or that plaintiff is necessarily barred for having applied for and accepted Workers' Compensation benefits. From aught that the record shows the defendant's tort was as alleged and there were equities which justified plaintiff in obtaining the benefits available. According to the complaint, and nothing in the record refutes it, the horrible, painful death of a young woman was caused by intentional conduct that was markedly calloused and without regard for the life and health of defendant's employees. Among other things it is alleged that defendant's plant handles, stores and utilizes liquefied petroleum gases; and the death of plaintiff's decedent was

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caused by an explosion and fire that resulted from various deliberate acts of defendant, including covering, and rendering inoperative, meters designed to detect dangerous gas and vapor levels. If the matters alleged be true, the welfare of all workers, their families, and the public at large requires, I think, that defendant not be deemed immune from suit because of the Workers' Compensation Act.

PEMBREE MFG. CORP. v. CAPE FEAR CONSTRUCTION CO., INC., T. R. DRISCOLL SHEET METAL WORKS, INC., AND KOONCE, NOBLE AND ASSOCIATES, INC.

No. 8316SC979

(Filed 3 July 1984)

1. Limitation of Actions § 17— statute of limitations—burden of proof

Once defendants properly pleaded the statute of limitations, the burden of showing that the action was instituted within the prescribed period was placed upon plaintiff, and it was incumbent upon plaintiff to come forward with a forecast of evidence tending to show that the action was started in apt time.

2. Limitation of Actions § 18.1— statute of limitations—summary judgment

Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. When, however, the statute of limitations is properly pleaded, and the facts with reference to it are not in conflict, it becomes a matter of law and summary judgment is appropriate.

3. Limitation of Actions § 18.1— statute of limitations—discovery of damages—question of law

In proper instances, whether a plaintiff discovered or ought reasonably to have discovered damages is a question of law to be determined by the court.

4. Limitation of Actions § 4.3— defective roof—accrual of cause of action

Plaintiff's discovery of leaks in its roof in 1973, 1976 and 1977 put it on notice that the roof was entirely defective, and plaintiff's claim for the defective roof instituted in 1981 against two building contractors and a professional engineering firm was barred by the three-year statute of limitations although the extent of the defects may not have been discovered until 1980. G.S. 1-52(1), (5) and (16).

5. Limitation of Actions § 15— no estoppel to assert statute of limitations

Defendants were not equitably estopped from asserting the statute of limitations in an action to recover for a defective roof where plaintiff provided no explanation as to what acts, representations or conduct by two defendants induced plaintiff's delay in initiating the action, and where acts by the third

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defendant suggested a denial of responsibility which should have served to hasten rather than delay the suit by a plaintiff.

Judge WELLS dissenting.

APPEAL by plaintiff from *Britt, Samuel E., Judge*. Judgment entered 22 June 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 6 June 1984.

Plaintiff appeals from two trial court orders: the first, granting summary judgment in favor of defendant Cape Fear Construction Co., Inc. (Cape Fear), and the second granting summary judgment in favor of defendants T. R. Driscoll Sheet Metal Works (Driscoll) and Koonce, Noble and Associates, Inc. (Koonce).

The undisputed facts are as follows:

In July 1972, plaintiff entered into a contract with Cape Fear and Driscoll under which Cape Fear and Driscoll were to construct a 30,000 square foot manufacturing plant in Lumberton, North Carolina. In August 1972, plaintiff entered into a contract with Koonce, a professional engineering firm, under which Koonce was to inspect the construction of the plant. The plant was substantially completed during January 1973, and plaintiff took occupancy of the building at that time.

In February or March 1973, Davis B. Pillet, president of plaintiff corporation, discussed with either T. R. or Stuart Driscoll, problems the plaintiff was having with roof leaks at the plant. In December 1976, as well as in January, February, March, and April 1977, Mr. Pillet had further discussions with Driscoll concerning roof leaks in many spots at the plant. During at least one of these conversations Driscoll blamed Cape Fear for faulty construction. In April 1977, Driscoll made some repairs to the plant's roof for which it charged plaintiff \$69.15 for materials and labor.

In April 1980, plaintiff retained Norman S. Pliner, a registered professional engineer, to inspect the plant's roof. In April, Mr. Pliner, and in May, Mr. Pliner and Richard T. Baxter, a roofing specialist, examined the roof of the plant. Their inspection revealed evidence of blistering throughout the entire roof which resulted from the entrapment of moisture in the several layers of roofing material.

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Plaintiff filed a complaint against defendants on 2 November 1981, claiming breach of contract, negligence and unjust enrichment. Defendants, in both their Answers to the Complaint and in their Motions for Summary Judgment, asserted that plaintiff's cause of action was barred by the applicable statute of limitations.

On 11 December 1981, Driscoll and Koonce filed a Motion for Change of Venue, and on 6 January 1982, Cape Fear joined in that Motion. On 24 May 1982, the Superior Court of Wake County granted the Motion, transferring this action to the Superior Court of Robeson County.

Hollowell and Silverstein, P.A., by Thaddeus B. Hodgdon; Everett E. Dodd; and Ward, Strickland and Kinlaw, by Earl H. Strickland; for plaintiff-appellant.

McLean, Stacy, Henry and McLean, by Dickson McLean, Jr., for defendant-appellee Cape Fear Construction Co., Inc.

Lee and Lee, by David F. Branch, Jr., for defendant-appellees T. R. Driscoll Sheet Metal Works, Inc., and Koonce, Noble and Associates, Inc.

VAUGHN, Chief Judge.

Two questions are presented on this appeal: (1) Was the cause of action alleged by defendants barred by the three-year statute of limitations? and (2) Does the doctrine of equitable estoppel apply to prevent defendants from asserting the bar of the statute of limitations?

Plaintiff's first contention is that the record is too bare to permit summary judgment.

[1] In reviewing a motion for summary judgment we must look at the record in the light most favorable to the party opposing the motion. *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 31, 187 S.E. 2d 487, 488 (1972). We must also regard the papers of the party opposing the motion indulgently. *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972). In so doing, however, we must not forget that once defendants properly pleaded the statute of limitations, the burden of showing that the action was instituted within the prescribed period was placed upon plaintiff. *Little v.*

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Rose, 285 N.C. 724, 727, 208 S.E. 2d 666, 668 (1974). It was, therefore, incumbent upon plaintiff to come forward with a forecast of evidence tending to show the action was started in apt time.

Plaintiff next asserts that whether it knew or reasonably could have known of the damage until after the Pliner inspection in 1980 is a question of fact. We disagree.

[2, 3] Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978). When, however, the statute of limitations is properly pleaded, and the facts with reference to it are not in conflict, it becomes a matter of law. *Little, supra*, and summary judgment is appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971). Further, in proper instances, whether a plaintiff "discovered or ought reasonably to have discovered" damages is a question of law to be determined by the Court. See *Blue Cross and Blue Shield v. Odell Associates, Inc.*, 61 N.C. App. 350, 301 S.E. 2d 459, *disc. rev. denied*, 309 N.C. 319, 306 S.E. 2d 791 (1983).

[4] Plaintiff admits that leaks were discovered "over the power pipes" in 1973, and "in many other spots" in 1976 and 1977, but contends that these leaks "were not of the same character or extent" as those on which the complaint is based. This reasoning leads plaintiff to the conclusion that the discovery of the leaks in 1973, 1976 and 1977 did not put it on notice that the roof was entirely defective. We disagree.

Plaintiff's cause of action is founded on the contention that the roof was defective. Plaintiff knew as early as 1973 that the roof had bad leaks. Starting in December, 1976, plaintiff's president had at least one conversation a month for five consecutive months with Driscoll concerning the "leaks over the power pipes and in many other spots." Since a sound roof does not leak, by April 1977 it ought reasonably to have become apparent to plaintiff that the roof had some defect.

Plaintiff argues that the leaks in 1973, 1976 and 1977 were not of the same extent as those discovered in 1980. This is irrelevant. Under G.S. 1-52(16) a cause of action "shall not accrue until bodily harm to claimant or physical damage to his property

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becomes apparent or ought reasonably to have become apparent to the claimant. . . ." This statute serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered.

The common law rule has long been that "[w]hen the right of the party is once violated, even in ever so small a degree, the injury, in the technical acception of that term, at once springs into existence and the cause of action is complete." *Mast v. Sapp*, 140 N.C. 533, 540, 53 S.E. 350, 352 (1906). See *Pearce v. Highway Patrol Vol. Pledge Committee*, 310 N.C. 445, 449, 312 S.E. 2d 421, 424 (1984). G.S. 1-52(16) modifies this rule in the case of latent damage only to the extent that it requires discovery of physical damage before a cause of action can accrue. It does not change the fact that once some physical damage has been discovered the injury springs into existence and completes the cause of action.

Plaintiff further contends that the leaks in 1973, 1976 and 1977 were not of the same character as those discovered in 1980. Even if we were to accept this as true it would not strengthen plaintiff's argument. Plaintiff's cause of action was founded on the assertion that the roof was defective. As stated above, the 1973, 1976 and 1977 leaks should have made it apparent to plaintiffs that the roof was defective. Thus, by 1976, plaintiff's cause of action for a defective roof had accrued. That further evidence of the defective nature of the roof was discovered in 1980 does not permit plaintiff to circumvent the bar of the statute of limitations.

[5] Plaintiff asserts that defendants should be equitably estopped from raising the bar of the statute of limitations. Plaintiff is correct in its assertion that, in a proper case, the doctrine of equitable estoppel may be invoked to prevent a defendant from relying on the tolling of the statute of limitations, see *Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E. 2d 673 (1979); however, this is not that proper case.

Equitable estoppel is appropriate when the delay in initiating an action has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. *Nowell v. Great Atlantic and Pacific Tea Company*, 250 N.C. 575, 579, 108 S.E. 2d 889, 891 (1959). Plaintiff provides no explanation as to what acts, representations or conduct by defendants Koonce

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and Cape Fear induced the delay in initiating this action. In fact, there is no evidence in the record that subsequent to plaintiff assuming occupancy of the plant defendants Koonce and Cape Fear had any further contact with plaintiff.

The record indicates that two acts or representations were made by defendant Driscoll: billing plaintiff \$69.15 for repairs made to the plant's roof and, in one or more conversations with plaintiff's president, blaming Cape Fear for faulty construction. Both of these acts suggest a denial of responsibility which, if anything, should serve to hasten rather than delay the bringing of suit by plaintiff.

As we hold that this action is barred by G.S. 1-52(1) and (5), and that summary judgment was properly granted, we deem it unnecessary to address plaintiff's assertion that G.S. 1-50(5), as amended in 1981, is inapplicable in this action.

Affirmed.

Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

Defects in a very large roof may be very difficult to correctly perceive and diagnose. The result of the majority opinion not only requires plaintiff's judgment of the defects ultimately diagnosed to rise to the level of preclusion, but it also will have the effect of pushing others similarly situated into early litigation. In cases such as this, plaintiff's efforts to get his few early leaks fixed without going to court should not cost plaintiff its cause of action. In my opinion, plaintiff was not reasonably aware of the damage to its roof until its expert correctly diagnosed such damage.

Industrial & Textile Piping v. Industrial Rigging

INDUSTRIAL & TEXTILE PIPING, INC. v. INDUSTRIAL RIGGING SERVICES, INC.

No. 8326SC811

(Filed 3 July 1984)

1. Appeal and Error § 57.2— conclusiveness of findings on appeal

When a trial court sits without a jury, its findings of fact have the force of a jury verdict and are conclusive on appeal if supported by competent evidence, even though there may be contrary evidence.

2. Contracts § 3— informal express contract— sufficiency of evidence

The trial court could properly conclude that the parties entered into an informal express contract, despite the lack of the formal document contemplated by the parties, where there was evidence that plaintiff accepted defendant's bid for an equipment rigging subcontract and ordered defendant to "man" the job; the parties agreed to the specific tasks defendant was to complete, to a time schedule for performance, and to payment terms; plaintiff sent a letter of intent to defendant to solidify their mutual understanding and agree on an adjusted price to be paid to defendant; the letter stated that plaintiff would "complete and meet for the formal contract signing" once the general contract was formally signed; defendant commenced work, and plaintiff made the first payments; and defendant subsequently refused to sign plaintiff's written subcontract on the ground that it contained new terms to which defendant had not agreed and would not agree.

3. Contracts § 12— subcontract—terms of general contract not incorporated therein

A subcontract did not necessarily incorporate the terms and conditions of the general contract where the trial court found that defendant subcontractor never agreed to be bound by the terms of the general contract.

4. Contracts § 20.2— prevention of performance by defendant

Where plaintiff and defendant entered into an informal subcontract, plaintiff tendered a subcontract form to defendant which incorporated the terms and conditions of the general contract, defendant refused to sign the subcontract form because it contained terms to which defendant had not agreed, plaintiff wrote defendant a letter directing defendant either to sign the subcontract form or to terminate its work for plaintiff, and defendant left the job as requested by plaintiff, the trial court properly found that plaintiff prevented defendant from fully performing the subcontract and that defendant's departure from the job was not a breach on its part.

5. Quasi Contracts and Restitution § 1.1— express contract— no recovery in quantum meruit

Quantum meruit is an appropriate measure of damages only for breach of an implied contract, and no contract will be implied where an express contract covers the same subject matter.

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6. Contracts § 29.2—breach of subcontract—measure of damages

The appropriate method for calculating damages for a general contractor's breach of a subcontract would be to determine lost profits by subtracting all of defendant subcontractor's actual expenses and expenses which would have been incurred pursuant to full performance from the price of the adjusted subcontract bid, to which would be added any additional expenditures which were contemplated in the subcontract and actually incurred.

7. Quasi Contracts and Restitution § 2—extra work not specified in subcontract—recovery in quantum meruit

A quantum meruit recovery would be proper for the reasonable value of extra work performed by a subcontractor for the general contractor which was not specified in the subcontract.

8. Appeal and Error § 25—improper cross-assignment of error

Defendant appellee's cross-assignment of error that it was entitled to a greater recovery than it received is essentially an attack on the judgment rather than an "alternative basis in law for supporting the judgment" and was not properly before the Court of Appeals. App. Rule 10(d).

APPEAL by plaintiff from *Sitton, Judge*. Judgment entered 23 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1984.

Plaintiff, a general contractor, sued defendant, its equipment erection subcontractor on a job, for breach of the subcontract. It sought to recover costs which it incurred in completing the equipment rigging which defendant had been hired to perform. Defendant counterclaimed for services rendered to plaintiff.

The trial court, sitting without a jury, made findings of fact and conclusions of law, and entered judgment for defendant in the amount of \$17,670.03 plus interest. Plaintiff appeals.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for plaintiff appellant.

Helms, Mullis & Johnston, by Norvin K. Dickerson, III, and Catherine E. Thompson, for defendant appellee.

WHICHARD, Judge.

[1] Plaintiff contends that since the court concluded that the parties had an express subcontract, it erred in not finding that the subcontract incorporated the terms of the general contract between plaintiff and the project owner. The conclusion that the

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parties made a "verbal contract" was based on findings to the effect that communications and conduct between the parties manifested a mutual assent. The court found, *inter alia*, that:

The services rendered by the defendant and the material it furnished to the project prior to the date the defendant was forced to leave the job were furnished in reliance on the plaintiff's acceptance of the defendant's bid, on plaintiff's representations to the defendant and on the plaintiff's letter of intent to the defendant.

Ample evidence supports this and related findings. When a trial court sits without a jury, its findings of fact have the force of a jury verdict and are conclusive on appeal if supported by competent evidence, even though there may be contrary evidence. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975).

[2] The findings are supported by evidence which showed the following:

Plaintiff accepted defendant's bid for the equipment rigging subcontract and ordered defendant to "man" the job. The parties agreed to the specific tasks defendant was to complete, to a time schedule for performance, and to payment terms.

Plaintiff sent a letter of intent to defendant to "solidify [their] mutual understanding" and agree on an adjusted price to be paid to defendant. The letter stated that plaintiff would "complete and meet for the formal contract signing" once the general contract was formally signed.

Defendant commenced work, and plaintiff made the first payments. Defendant subsequently refused to sign plaintiff's written subcontract, however, on the ground that it contained new terms to which defendant had not agreed and would not agree.

This constituted evidence from which the court could conclude that an informal contract existed, even in the absence of a formal written document. *See* 1 W. Jaeger, *Williston on Contracts* §§ 17-21 (3d ed. 1957); *see also* 1 A. Corbin, *Contracts* § 30, at 100-03 (1963), which states:

Often a subcontractor submits a bid, in accordance with prepared plans and specifications, for the prime contractor's

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use in obtaining the principal contract; the latter's acceptance of the bid may consummate the subcontract even though it is not reduced to a formal instrument as was contemplated; the terms may be sufficiently definite and complete.

The parties' failure to reach agreement on the written subcontract does not preclude the conclusion that an express contract existed. In *Bank v. Wallens*, 26 N.C. App. 580, 217 S.E. 2d 12, cert. denied, 288 N.C. 393, 218 S.E. 2d 466 (1975), this Court held that a contract could exist on the basis of a "memorandum agreement" which the parties intended to serve as an agreement until "proper complete documents" could be drawn. Similarly, the court could conclude that the conduct of the parties and letter of intent here created a contract despite lack of the formal document which the parties contemplated. See also *Frank Horton & Co. v. Cook Electric Co.*, 356 F. 2d 485 (7th Cir.), cert. denied, 384 U.S. 952, 16 L.Ed. 2d 548, 86 S.Ct. 1572 (1966).

[3] We find no merit in plaintiff's contention that the subcontract necessarily incorporated the terms and conditions of the general contract between plaintiff and the owner. Plaintiff tendered a subcontract form which incorporated the terms and conditions of the general contract. Defendant rejected the form. Plaintiff argues that despite defendant's rejection thereof, defendant was nonetheless bound by the terms and conditions in the form, since it had notice that under the general contract specifications plaintiff was required to impose such terms in the subcontract. The trial court found, however, that defendant never agreed to be bound by the terms of the general contract addressed to plaintiff. That finding is supported by competent evidence indicating that defendant never expressly agreed to the terms in question, and specifically objected to such terms when plaintiff tried to make them express in the subcontract form.

[4] Plaintiff wrote defendant a letter, which was introduced at trial, directing defendant either to sign the subcontract form or to terminate its work for plaintiff. Because the subcontract form contained terms to which defendant had not agreed, and which would be detrimental to it, defendant left the job as requested by plaintiff. The trial court's findings based on this evidence fully support its conclusions that (1) plaintiff prevented defendant from fully performing the contract, and (2) defendant's departure from the job was not a breach on its part.

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[5] The trial court ruled that defendant was entitled to damages based on *quantum meruit* for plaintiff's breach of the contract. *Quantum meruit* is an appropriate measure of damages only for breach of an implied contract, and no contract will be implied where an express contract covers the same subject matter. *Beckham v. Klein*, 59 N.C. App. 52, 58, 295 S.E. 2d 504, 507-08 (1982). Since the court properly found and concluded that an express contract existed, it erred in awarding damages based on *quantum meruit*.

[6] The measure of damages for breach of express contract in North Carolina has been stated as an amount which reasonably may be supposed to have been contemplated by the parties when they entered the contract, or which will compensate the injured party as if the contract had been fulfilled. *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 560-61, 234 S.E. 2d 605, 607 (1977). Such damages may include lost profits if shown with sufficient certainty. *Id.*; see also *Willis v. Russell and Freeman*, 68 N.C. App. 424, 315 S.E. 2d 91 (1984). An appropriate method for calculating damages here would be to subtract all of defendant's actual expenses, and expenses which would have been incurred pursuant to full performance, from the price of the adjusted or modified subcontract bid. This would determine lost profits, to which any additional expenditures which were contemplated in the subcontract and actually incurred could be added to reach the final damages figure. See *Frank Horton & Co.*, *supra*, 356 F. 2d at 491-92; 5 A. Corbin, *Contracts* § 1031, at 194-95 (1964) (judgment for both profits and expenditures "entirely proper . . . provided that sufficient care is taken to avoid giving a double recovery for the same element of harm"). Plaintiff would be entitled to a credit against that sum for payments already made.

[7] Defendant also alleged performance of extra work for plaintiff which was not specified in the subcontract. If the trial court finds that such work was performed, a *quantum meruit* recovery for its reasonable value would be proper. *Hood v. Faulkner*, 47 N.C. App. 611, 615-16, 267 S.E. 2d 704, 706 (1980).

Defendant raises two issues through cross-assignments of error. N.C. R. App. P. 10(d) provides that cross-assignments of error may be brought forward to challenge "any action or omission of the trial court . . . which deprived the appellee of an alternative

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basis in law for supporting the judgment." While defendant properly brings forward its argument regarding alternative bases for finding plaintiff liable, we need not address the argument, since we have found no error in the conclusion that plaintiff is liable for breach of an express subcontract.

[8] Defendant also argues that it is entitled to a greater recovery than it received. This argument is essentially an attack on the judgment rather than an "alternative basis in law for supporting the judgment." It therefore is not properly before this Court. *Stevenson v. North Carolina Dept. of Ins.*, 45 N.C. App. 53, 56-57, 262 S.E. 2d 378, 380-81 (1980). Further, our holding that the court improperly calculated defendant's damages, and the remand for proper calculation hereinafter made, effectively grant defendant the opportunity to obtain the relief it seeks by this argument.

With the exception of the portions relating to calculation of defendant's damages, the judgment is affirmed. The portions relating to calculation of defendant's damages are vacated, and the cause is remanded for modification of the judgment to contain an appropriate calculation.

Affirmed in part, vacated in part, and remanded.

Judges WEBB and HILL concur.

JOHN A. BYRD v. R. W. WILKINS, JR., COMMISSIONER OF MOTOR
VEHICLES OF NORTH CAROLINA

No. 8318SC903

(Filed 3 July 1984)

**Administrative Law § 8; Automobiles § 2.4— drunk driving—breathalyzer test—
smoking as willful refusal to take—revocation of license—court's vacating of
revocation order improper**

Where respondent revoked petitioner's driver's license after determining that he had willfully refused to submit to a breathalyzer test following his arrest for driving under the influence, the trial court erred in vacating the revocation order on the ground that petitioner's conduct in smoking, despite the breathalyzer operator's repeated instructions not to do so, did not constitute refusal to take the test, since the court's conclusion, in light of the find-

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ing on which it was grounded (that the operator had no reason to believe smoking would affect the reading), was to review judicially, and negate, a duly enacted regulation of the Commission for Health Services; such review is authorized only upon evidence from which the court can find fraud, manifest abuse of discretion, conduct in excess of lawful authority, or unreasonableness amounting to oppressive and manifest abuse; and no such evidence appeared in this case.

APPEAL by respondent from *McLelland, Judge*. Order entered 6 January 1983 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 10 May 1984.

Pursuant to G.S. 20-16.2, respondent revoked petitioner's license to drive after determining that he had willfully refused to submit to chemical analysis following his arrest for driving while under the influence of alcohol. The trial court, upon hearing *de novo* under G.S. 20-16.2(e), vacated the revocation order on the ground that petitioner's conduct did not constitute a willful refusal since it could not have affected the breathalyzer test results.

From this order, respondent appeals.

Attorney General Edmisten, by Assistant Attorney General Jane P. Gray, for respondent appellant.

Musselwhite, Musselwhite & McIntyre, by W. Edward Musselwhite, Jr., for petitioner appellee.

WHICHARD, Judge.

Neither party has excepted to the following finding of fact, which evidence admitted without objection supports:

4. That Petitioner was offered a breathalyzer test at the law enforcement center and was told, *inter alia*, that he would be observed for twenty minutes before the test would be administered and that during such time he must put nothing in his mouth; that he took out a cigaret [sic] and was told by the officer that since he must put nothing in his mouth, he might not smoke, and he did not; that Petitioner, being very agitated, twice further started to smoke and refrained on being further admonished; that Petitioner was specifically admonished that if he smoked, the test would not be administered and his refusal to follow the directive of the officer in such particular would be counted a willful refusal to

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take the breathalyzer test and would result in suspension of his driver[']s license; that Petitioner, understanding the admonition, smoked a cigaret [sic], and the breathalyzer operator refused to administer the test, stating that he regarded Petitioner as wilfully refusing to take it, although Petitioner, after smoking, requested its administration.

Respondent has excepted, however, to the following further finding and conclusion, on the basis of which the trial court vacated respondent's revocation of petitioner's license to drive for willful refusal to take a breathalyzer test:

5. That the breathalyzer operator has no reason to believe from his training in the use of the machine that cigaret [sic] smoke has any effect on its operation, and believes that the reading would not be varied by the inhalation of cigaret [sic] smoke before the test, barring, of course, the blowing of smoke into the machine.

The court concludes from these findings that the willful refusal of Petitioner to follow the directive of the breathalyzer operator to refrain from smoking did not constitute a refusal to take the breathalyzer test.

We hold the conclusion erroneous, and accordingly reverse.

G.S. 20-139.1(b), in pertinent part, provides:

A chemical analysis, to be valid, must be performed in accordance with the provisions of this section. The chemical analysis must be performed according to methods approved by the Commission for Health Services. . . . The Commission for Health Services is authorized to adopt regulations approving satisfactory methods or techniques for performing chemical analyses

"Judicial notice must be taken . . . of important administrative regulations having the force of law." 1 H. Brandis, *North Carolina Evidence* § 12, at 35-36 (1982); *see also, e.g., Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 338, 88 S.E. 2d 333, 337 (1955). We take judicial notice that, pursuant to the foregoing statute, the Commission for Health Services has adopted the following regulation on the procedure to be followed in administering breathalyzer tests:

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A chemical analyst shall observe the person to be tested closely and continuously for at least 20 minutes immediately prior to collection of the breath specimen, during which period the person must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked.

10 NCAC 7B:0336 (1982) (succeeding sections relate to different types of breathalyzer machines; all contain the quoted provision). "When discretionary authority is vested in [a] commission, the Court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene." *Pharr v. Garibaldi*, 252 N.C. 803, 811-12, 115 S.E. 2d 18, 24-25 (1960); see also *Highway Commission v. Board of Education*, 265 N.C. 35, 48, 143 S.E. 2d 87, 97 (1965) ("exercise . . . of such discretionary authority and powers is not subject to judicial review, unless . . . so clearly unreasonable as to amount to oppressive and manifest abuse").

Finding number five, *supra*, on the basis of which the court concluded that petitioner's willful refusal to follow the directive to refrain from smoking did not constitute a refusal to take the test, was based on the following testimony by the breathalyzer operator:

I don't know whether two or three puffs would have gummed up the machine. I can't testify as to whether or not tobacco smoke has any effect on the machine. As to whether or not I am taught that the only thing that will affect the machine is alcohol, that is not the only thing. It is affected by formaldehyde and ether. I don't know whether tobacco is likely to produce either of those. As to whether it would or would not affect the machine if it produced either of those, I don't think it would affect it, really. My personal feeling is that smoke would not affect the breathalyzer.

The court itself elicited this testimony after the parties had completed their examination of the operator. The testimony was offered without forewarning, and apparently without forethought. It stated the mere offhand opinion of the operator, unsupported by scientific data, other substantive evidence, or expert opinion. It was controverted by the other officer who was participating in administration of the test; he testified that the reason for the

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regulation was that engaging in the activities which it proscribed "possibly could have some effect on the breathalyzer if it was done just immediately prior to the test. It possibly could give a bad reading."

The conclusion that petitioner's refusal to follow the operator's directive did not constitute refusal to take the test, which conclusion evidently was grounded on the finding that the operator had no reason to believe smoking would affect the reading, in effect constituted judicial review, and negation, of the regulation pursuant to which the operator acted. While the above evidence supports the finding, it did not suffice to permit a finding of fraud, manifest abuse of discretion, or conduct in excess of the lawful authority of the Commission in the adoption of the regulation. The regulation is not, either facially or when considered in light of the foregoing evidence, so clearly unreasonable that its adoption constituted oppressive and manifest abuse of discretion. The court thus erred in effectively reviewing and negating it.

This Court has stated:

[T]he full import of G.S. 20-16.2(c) requires an operator of a motor vehicle, who has been charged with the offense of driving under the influence of intoxicating liquor, to take a breathalyzer test, *which means the person to be tested must follow the instructions of the breathalyzer operator*. A failure to follow such instruction . . . provide[s] an adequate basis . . . to conclude that petitioner willfully refused to take a chemical test of breath in violation of law.

Bell v. Powell, Comr. of Motor Vehicles, 41 N.C. App. 131, 135, 254 S.E. 2d 191, 194 (1979) (emphasis supplied). Finding number four, *supra*, which is supported by evidence admitted without objection, and to which neither party has excepted, establishes that the breathalyzer operator clearly instructed petitioner not to smoke, and gave him adequate notice that his smoking would be treated as a willful refusal to take the test. It further establishes that petitioner nevertheless proceeded to smoke. His failure to follow the operator's instructions provides an adequate basis for concluding that he willfully refused to take the test. *Bell, supra*.

We hold that the conclusion that "the willful refusal of Petitioner to follow the directive of the breathalyzer operator to

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refrain from smoking did not constitute a refusal to take the breathalyzer test" was erroneous. We so hold on the basis that its effect, in light of the finding on which it was grounded, was to review judicially, and negate, a duly enacted regulation of the Commission for Health Services. Such action is authorized only upon evidence from which the court could find fraud, manifest abuse of discretion, or conduct in excess of lawful authority, *Pharr, supra*, or unreasonableness amounting to oppressive and manifest abuse, *Highway Commission, supra*. No such evidence appears.

We further hold that finding number four, rather than finding number five, should have been the dispositive finding. In light of *Bell, supra*, the correct legal conclusion from that finding is that petitioner willfully refused to take the test.

The order vacating and setting aside the revocation of petitioner's license to drive is therefore reversed, and the cause is remanded for entry of an order affirming the revocation.

Reversed and remanded.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. JIMMIE R. HOLLOWAY

No. 8310SC994

(Filed 3 July 1984)

1. Criminal Law § 91.7; Constitutional Law § 48— denial of continuance—no denial of effective assistance of counsel

There was no merit to defendant's contention that the trial court's refusal to continue his trial denied him the effective assistance of counsel where the record showed that defense counsel indicated the absence of a particular witness and moved for a continuance; counsel asserted that he had subpoenaed the witness and directed him to bring certain documents to court, but no copy or other record of the subpoena was in the file; the record contained no indication as to what the witness would have testified to or what papers he was directed to bring to court; defendant had been represented by the same counsel for more than six months; trial had been continued several times before, the last time at defendant's request; and no error or prejudice was shown by denial of the continuance.

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2. Insurance § 141— burglary—filing false claim—willful and knowing—sufficiency of evidence

In a prosecution of defendant for filing a false insurance claim, there was no merit to defendant's contention that the evidence was insufficient to show that he acted knowingly and willfully in making the claim, since the evidence tended to show that defendant's place of business was burglarized; he twice expanded the list of missing articles, the second time including the TV in question; three months prior to the burglary defendant himself carried the TV from his store, placed it in the car of an undercover IRS agent, and saw it driven away; the TV was still in the possession of the IRS agent when trial began, but defendant nevertheless falsely claimed the TV was stolen during the burglary; and it could be inferred from the evidence that defendant's memory had not failed him as to the whereabouts of the TV.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 3 May 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 14 March 1984.

Defendant was convicted of presenting a false insurance claim, in violation of G.S. 14-214.

The State's evidence tended to show the following: Defendant's retail electronics store in the Town of Wake Forest was broken into on 7 November 1980 shortly after midnight. Two patrolling police officers heard the burglar alarm go off, went to investigate, saw that the store's front window was broken out, and telephoned the defendant. Upon arriving at the store, defendant looked around, and told the officers that a stereo receiver and speaker were missing. After the officers had concluded their investigation and resumed their normal patrols, defendant stopped them and said that a portable television set was also gone, and later that same morning defendant telephoned the police station and stated that a 19-inch Sylvania color television set was stolen as well. Still later that day, defendant telephoned the insurance agent that issued his burglary policy and gave him information which enabled the agent's bookkeeper to compile a property loss report; and defendant, himself, prepared and delivered to the agent a list of articles claimed to be missing, along with the wholesale cost of each. Both papers, which listed a 19-inch Sylvania color television set bearing model number CX0178-WR and serial number 2088447, were forwarded to the insurance company by the agent. The company assigned defendant's claim to an adjuster, who contacted defendant about it several days later. At that time, defendant confirmed that the TV previously described

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was taken during the robbery and that its wholesale cost was \$528; and when the adjuster asked him about not mentioning the Sylvania TV during his first two conversations with the police, defendant stated that he was busy trying to make the store secure and did not notice its absence until later.

An undercover agent for the Internal Revenue Service testified that: He and another agent were investigating the defendant's operations during the summer of 1980 and in August, three months before the robbery, they obtained the identified 19-inch Sylvania color television set from the defendant and still had custody of it. Though the record does not show why defendant was being investigated or what was said by defendant and the agent during the conversation that preceded and accompanied the acquisition of the television set, the transaction was recorded on video, and both the video and the TV set were received into evidence as exhibits.

No evidence was presented by defendant.

Attorney General Edmisten, by Associate Attorney General David R. Minges, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

PHILLIPS, Judge.

[1] The first error that defendant contends the court committed was in not continuing the trial of his case. His assertion now is that the court's refusal to delay the trial denied him the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and due process of law guaranteed by the Fourteenth Amendment. But the record does not show that any constitutional question was raised in the trial court, which is usually necessary for such a question to be considered on appeal. *State v. Robertson*, 57 N.C. App. 294, 291 S.E. 2d 302, *rev. denied*, 305 N.C. 763, 292 S.E. 2d 16 (1982). All that the record shows in this regard is that: Just before the trial started, on Monday, May 2, 1983, counsel for defendant, ascertaining that no employee of the IRS office in Greensboro was in the courtroom, moved for a continuance. In doing so he asserted that he had subpoenaed the IRS Deputy Director and directed him to bring certain documents

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to court; but no copy or other record of the subpoena was in the file and the record contains no indication as to what the witness would have testified to or what papers he was directed to bring to court. Upon inquiry by the court, counsel responded that the subpoena was mailed to the sheriff in Greensboro six days earlier, on Tuesday, April 26, 1983, and the only communication that he had either made or received about it was a telephone call from the Acting IRS Director two or three days later to the effect that the Deputy Director was out of town, the Guilford County Sheriff had told him he doubted that the subpoena could be served on anybody but the Deputy Director to whom it was addressed, and that an IRS attorney or other representative would call counsel again before long. No other contention or representation by defendant is recorded; but the record does show that he had been represented by the same counsel for more than six months and that the trial had been continued several times before, the last time at defendant's request. Though motions based on a constitutional right raise a question of law and are reviewable, *State v. Maher*, 305 N.C. 544, 290 S.E. 2d 694 (1982), whereas the usual motion for a continuance involves only the judge's discretion, it is plain that however defendant's motion is viewed the assignment of error is without merit, since neither error nor prejudice has been shown.

[2] Defendant's only other assignment of error is that the evidence presented against him was not sufficient to justify his conviction. We disagree.

G.S. 14-214 provides:

Any person who shall willfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance or certificate of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents or writing, with intent that the same may be presented or used in support of such claim, shall be punished as a Class I felon.

Defendant's contention is not that the evidence was insufficient to show that the claim he made against the insurance company was false, as it manifestly was, but only that it does not show that he

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acted *knowingly* and *willfully* in making it. In determining this question we are not obliged to define the words *willfully* and *knowingly* as they are used in this statute, for our Supreme Court has already done that several times heretofore. In *State v. Stephenson*, the Court said:

The word "willfully" as used in this statute means something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law. *S. v. Whitener*, 93 N.C., 590; *Foster v. Hyman*, 197 N.C., 189, 148 S.E., 36. The word "knowingly" as so used, means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged. These words combined in the phrase "willfully and knowingly" in reference to violation of the statute, mean intentionally and consciously. As used in the present indictment it means that defendant for purpose of collecting insurance intentionally made a false claim as to the value of the tobacco burned, with knowledge and conscious of the fact that the claim was false and fraudulent.

218 N.C. 258, 264, 10 S.E. 2d 819, 823 (1940). Also see *State v. Fraylon*, 240 N.C. 365, 82 S.E. 2d 400 (1954).

In our opinion the evidence presented by the State clearly justifies the jury in concluding that defendant in filing the false claim involved acted knowingly and willfully, as those words have been judicially defined. That defendant three months earlier personally carried the TV set in question from his store, put it in the car of an undercover IRS agent, saw it driven away, and the set was still in the possession of the IRS when the trial began, as the video and other evidence indicated was the case, certainly tended to show that defendant knew the set was not in his store when it was burglarized; and that he nevertheless falsely claimed the TV set was stolen during the burglary tends to show that the claim was both knowingly and willfully made. Defendant's contention that the evidence is deficient because it does not show that he *remembered* what had been done with the set when the false claim was presented is rejected. Nothing in the evidence suggests that defendant's memory was deficient and that he did not claim the TV set was missing until several hours had passed and he had twice expanded the list of missing articles indicates that listing

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the TV set was no spur of the moment mistake, as defendant contends. It was permissible and proper, we think, for the jury to infer from the evidence before them that defendant did remember that the TV set had been taken away earlier and was not in the store when the insurance loss occurred. Courts have long permitted the subjective mental state of people to be inferred from their conduct. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). This became a rule of law, not only by necessity, since direct proof of intentions and the like is seldom available, but because it was first a rule of life. From the earliest times until the present day the collective experience of human kind, as so many sayings and adages that have come down to us from sages, poets and ordinary people attest, has confirmed the belief that action does speak as loud as, if not louder than, words and that thoughts and intentions can be deduced as well from what one has done as it can from what has been said.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. CARROLL EUGENE MATTHEWS

No. 8329SC705

(Filed 3 July 1984)

1. Criminal Law § 102.8— no comment on defendant's failure to testify

The prosecutor's jury argument that the State's evidence was contradicted did not constitute an improper comment upon defendant's failure to testify.

2. Criminal Law § 138— mitigating factors—insufficient evidence

Unsworn statements by defense counsel were insufficient to require the trial court to find statutory mitigating factors.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 8 December 1982 in Superior Court, HENDERSON County. Heard in the Court of Appeals 18 January 1984.

In case 82CRS1079 defendant was indicted and tried upon a charge of assault with a deadly weapon with intent to kill inflict-

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ing serious injury. In cases 81CRS3501 and 81CRS10257 defendant was charged with having violated the conditions of probation. Upon a jury verdict of guilty of assault with a deadly weapon inflicting serious injury, defendant was sentenced to a term of ten years. The trial judge found defendant in willful violation of his probation. Consequently, defendant's probation was revoked and the suspended sentence of twelve months was placed into immediate effect. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Nora Henry Hargrove, for defendant appellant.

JOHNSON, Judge.

The State's evidence was uncontradicted and tended to show the following: Terry Wilkie is the mother of defendant's child. Terry and the child were living in the house of Terry's father, Charles B. Wilkie. In the early morning hours of 8 February 1982, defendant appeared at the outside of Terry's bedroom window while Terry and the child were asleep therein. Defendant woke Terry by tapping on the window. When Terry opened the window slightly to inquire as to what defendant wanted, defendant, over Terry's protest, opened the window wider and entered the bedroom and refused to leave. Defendant had a pocketknife in his possession at the time. Terry went to her father's room and asked her father to make defendant leave. Mr. Wilkie opened the front door and yelled to defendant to leave. As defendant walked toward the front door, as if to leave, he pushed Mr. Wilkie and stabbed him in the abdomen with the pocketknife. Mr. Wilkie underwent surgery and was hospitalized for one week. Defendant offered no evidence.

Defendant brings forward two assignments of error: (1) that the district attorney improperly commented on defendant's failure to testify; and (2) that the trial court committed prejudicial error in sentencing defendant by failing to find five statutory factors in mitigation.

I

[1] During closing argument, the district attorney made the following statement to the jury:

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The State's evidence, in this case, members of the jury, is uncontradicted. There's one thing that impresses me, and I hope you noticed it. Both of these folks went on the stand, and I believe did their very best to be absolutely fair and straightforward in the way that they testified and in the things that they said. And that doesn't happen in every case. I didn't see the slightest evidence that either one of these people were trying to tell you anything that was not correct, and Miss Wilkie admitted everything about what happened that night. I believe these folks told it in a straightforward manner and that you have the true facts in this case before you as the facts were described by these two witnesses. Their testimony is uncontradicted. It simply comes down to a matter of what does the jury conclude given these facts? So, I submit that the evidence is uncontradicted

It is well settled that a defendant's failure to take the stand and testify during his trial may not be used against him at trial and may not be commented upon by the prosecution. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965); U.S. Const. amend. V and amend. XIV; N.C. Const. art. 1, § 23; G.S. 8-54. Defendant contends the district attorney's remarks amount to an improper comment upon defendant's failure to testify, while the State contends that the remarks do not constitute a comment upon defendant's failure to testify.

We find that *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 2d 301 (1976) and *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977) are dispositive of this assignment of error. In *Smith*, as in this case, the defendant offered no evidence. The Supreme Court summarized the challenged remarks made by the district attorney in his closing argument as follows:

- (1) That defendant "would have you believe that he did not participate at all"; (2) that Mrs. Hall "was on the stand for a considerable time and nobody pointed a finger of accusation at her, not even on cross-examination"; (3) that, referring to the victim, "the evidence is uncontradicted, bear that in mind, that he not only didn't have a weapon, there was not one in his house"; (4) that "this testimony is uncontradicted as is every bit of the State's evidence"; (5) that "there is not

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a scintilla of evidence from any source that anybody was ever on the scene except Brady Tilley and Harold Jordan and J. V. Smith"; (6) that, referring to the testimony of Julia Pruitt, "J. V. left there with the automatic, the pistol stuck in his belt, and ladies and gentlemen, throughout this thing I ask you to remember that this evidence is uncontradicted"; (7) that "Brady Tilley and Harold Jordan are still there and then the uncontradicted evidence is that the group sat down there at the table and they were strangely quiet"; and finally, (8) that "I ask you to decide the case on the evidence that you have before you and ask that you remember that it is uncontradicted."

Id. at 165-166, 226 S.E. 2d at 21. The Court held that since contradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination of the State's witnesses, the prosecution was privileged to argue that the State's evidence was uncontradicted and that such argument did not constitute an improper comment upon defendant's failure to testify.

In *Tilley*, the defendant also failed to present evidence and likewise contended that the district attorney improperly commented on defendant's failure to testify by arguing to the jury that "not a single word of it [State's evidence] is contradicted, and there is a lot of difference between denying it and contradicting (it)." 292 N.C. at 143, 232 S.E. 2d at 441. In holding that the district attorney's comments were not improper, the court stated that while the defendant's failure to testify is not the subject of comment or consideration, the jury, in weighing the credibility of the evidence offered by the State may consider the fact that it is uncontradicted or unrebutted. Consequently, the State is permitted to draw the jury's attention to this fact. *Id.*

The challenged remarks of the district attorney in the case *sub judice* are similar to the challenged remarks in *Smith* and *Tilley*, and were likewise directed to the jury's role in weighing the uncontradicted evidence and considering the credibility of the State's witnesses. Therefore, the challenged statements did not constitute comments on defendant's failure to testify. Accordingly, defendant's first assignment of error is without merit.

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II

[2] By his final assignment of error, defendant contends that the court erred in sentencing him by failing to find the following five statutory mitigating factors:

1. The defendant committed the offense under duress . . . which was insufficient to constitute a defense but significantly reduced his culpability. G.S. 15A-1340.4(a)(2)(b).
2. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense. G.S. 15A-1340.4(a)(2)(d).
3. The defendant's . . . limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense. G.S. 15A-1340.4(a)(2)(e).
4. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating. G.S. 15A-1340.4(a)(2)(i).
5. The defendant has made substantial or full restitution to the victim. G.S. 15A-1340.4(a)(2)(f).

Where the evidence in support of a mitigating factor is substantial, uncontradicted and inherently credible, it is error for the trial court to fail to find such mitigating factor. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983); *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984). The defendant has the burden of establishing such mitigating factors by a preponderance of the evidence. *State v. Jones, supra*; *State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983).

At the sentencing hearing, the State presented evidence of defendant's prior convictions. The only evidence presented by defendant was an unsworn statement by defense counsel to the effect that defendant was evaluated at Dorothea Dix Hospital¹

1. The report from Dorothea Dix Hospital was not included as part of the record on appeal and the only indication of its contents may be gleaned from the following comment by the district attorney to the trial court: "I saw that [report]. I think Dr. Royal made that report, and I don't think he indicated there was anything wrong with the man [defendant] other than being anti-social . . ."

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after the assault upon Mr. Wilkie and that defendant, although unemployed, is a good worker. Further, that defendant has stated that he wanted to help pay Mr. Wilkie's hospital bill.

In *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), the defendant's attorney, in his final argument on sentencing, stated that defendant did not have a criminal record. The Supreme Court stated that an unsworn statement by an attorney is not such uncontradicted credible evidence as to require the trial court to find a mitigating factor. None of the evidence presented by defendant in the case *sub judice*, nor any of the evidence presented at trial, supports the finding of any statutory mitigating factors. Therefore, defendant has failed to carry his burden on this issue. *State v. Jones, supra*; *State v. Thompson, supra*. Consequently, defendant's assignment of error is without merit.

In defendant's trial we find

No error.

Chief Judge VAUGHN and Judge WEBB concur.

JOY O. GILLESPIE AND BAILEY GILLESPIE v. AMERICAN MOTORS CORPORATION, AMERICAN MOTORS SALES CORPORATION, JEEP CORPORATION AND VALLEY MOTOR SALES, INC.

No. 8329SC138

(Filed 3 July 1984)

Sales §§ 17, 23— defective vehicle—use of vehicle by purchaser—contributory negligence

The trial court properly granted defendants' motions for summary judgment on plaintiffs' claims of negligence, breach of warranty and an inherent defect in a vehicle purchased by plaintiffs and manufactured and sold by defendants, since the evidence tended to show that plaintiffs were contributorily negligent as a matter of law in using the vehicle for three years and driving it 62,000 miles in spite of the fact that they were aware of noxious fumes in the passenger area of the vehicle within a week after it was purchased and in spite of the fact that the female plaintiff continued to ride in the vehicle though her physician had advised her not to do so.

Judge WELLS dissenting.

Gillespie v. American Motors Corp.

APPEAL by plaintiffs from *Thornburg, Judge*. Judgment entered 20 September 1982 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 13 January 1984.

This is an action based on negligence and breach of warranty. This case has been in this Court previously. *See Gillespie v. American Motors Corp.*, 51 N.C. App. 535, 277 S.E. 2d 100 (1981) in which we held the action was not barred by the statute of limitations. The plaintiffs' action is based on three separate claims. In their first claim, the plaintiffs allege the negligent design, manufacture, inspection and maintenance of a Jeep Cherokee wagon purchased by the plaintiffs which they allege constituted malicious and wanton disregard of the rights of the plaintiffs. For their second claim, they allege breach of warranty and for their third claim, that the vehicle, when sold to them, contained an inherently defective gasoline ventilation and emission system. The plaintiffs allege that because of the defective gas ventilation and emission system, noxious gas fumes were emitted into the passenger compartment of the vehicle and the plaintiffs were damaged thereby.

The defendants made a motion for summary judgment. The papers submitted in support of and in opposition to the motion for summary judgment showed that the plaintiffs purchased a Jeep Cherokee wagon from the defendant Valley Motor Sales, Inc. on 23 December 1975. Shortly after the vehicle was purchased, the plaintiffs noticed gas fumes in the interior of the vehicle. The vehicle was returned to Valley Motor Sales many times, commencing in late December 1975 but the defect was not corrected. On 29 March 1979, the vehicle was carried to a dealer in Charlotte where a new gas tank and vent kit were installed but this did not correct the defect. Joy Gillespie began having headaches, nausea, and drowsiness. She consulted a doctor and he advised her that her condition was probably related to the noxious fumes emitted by the Jeep wagon. He advised her not to ride in it. Joy Gillespie did not take this advice, but continued to ride in the vehicle. The plaintiffs drove the vehicle 62,000 miles during a three-year period after they first smelled the fumes.

The court granted the defendants' motions for summary judgment on the negligence claim, the claim for an inherent defect, and for personal injuries on the breach of warranty claim. The plaintiffs appealed.

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Tomblin and Perry, by Vance M. Perry and A. Clyde Tomblin, for plaintiff appellants.

Mullen, Holland and Cooper, by R. T. Wilder, Jr., and William E. Moore, Jr., for defendant appellee American Motors Corporation.

Golding, Crews, Meekins, Gordon and Gray, by Marvin K. Gray and Ned A. Stiles; and Hamrick, Bowen, Nanney and Dalton, by Louis W. Nanney, Jr., for defendant appellee Valley Motor Sales, Inc.

WEBB, Judge.

If the papers filed in support of and in opposition to the defendants' motions for summary judgment present a forecast of evidence which, if offered at trial, would require a directed verdict for the defendants, then the court properly granted the motion for summary judgment. See *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). We hold that the papers filed in this case show that the plaintiffs were contributorily negligent as a matter of law. We affirm summary judgment for the defendants.

The papers show that the plaintiffs knew of the noxious fumes in the passenger area of the vehicle within a week after it was purchased. They continued using the vehicle for more than three years and drove it 62,000 miles during that time. Mrs. Gillespie's physician advised her to stop riding in the vehicle but she continued to do so. In *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780 (1960) our Supreme Court held that when a person continues driving a vehicle when he knows of a defect, he is contributorily negligent as a matter of law and barred from recovering damages which are caused by the defect. The Supreme Court held this is so whether the plaintiff's claim is based on negligence or breach of warranty. We hold that we are bound by that case to affirm the judgment of the superior court.

The plaintiffs contend that they should not be barred by contributory negligence because they alleged that the acts of the defendants constituted "wanton, willful and culpable misconduct on their part." In spite of these allegations, we do not believe the plaintiffs have shown any wanton, willful or culpable misconduct

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on the part of the defendants. Bailey Gillespie stated that he did not believe the defendants intentionally sold him a defective vehicle. We do not believe it was necessary for the defendants to advise the plaintiffs that a bulletin from American Motors showed some people were complaining of fumes in Jeeps when the plaintiffs were well aware that there were fumes in their Jeep.

Affirmed.

Judge WHICHARD concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I believe the forecast of evidence in this case raises a genuine material issue of fact as to whether plaintiffs reasonably relied on defendant's assurances that defects in plaintiffs' vehicle had been repaired or corrected. I cannot agree that the forecast shows plaintiffs to have been contributorily negligent as a matter of law. Generally, I believe that defective products cases should be liberally construed in favor of injured parties. I vote to reverse summary judgment for defendants.

KAREN SUE ANDERSON, INDIVIDUALLY, AND AS GUARDIAN OF PAUL MICHAEL ANDERSON, A/K/A PAUL MICHAEL BLUNK, MINOR v. CLEM LEE CANIPE AND WIFE, GAYNELL CANIPE, AND CLEM LEE CANIPE, III, MINOR

No. 834SC425

(Filed 3 July 1984)

1. Assault and Battery § 3— assault and battery by minor—genuine issue of material fact

In an action to recover for injuries received by the minor plaintiff when he was struck on the head and mouth by a cast worn on the arm of the minor defendant, summary judgment was improperly entered in favor of the minor defendant where a genuine issue of material fact was presented as to whether defendant intentionally struck plaintiff.

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2. Parent and Child § 8— liability of parents for torts of child

In general, parents are not liable for the torts of their minor children solely by reason of their parent-child relationship. Liability may be imposed on parents, however, if they know, or in the exercise of reasonable care should have known, of the child's habits, tendencies or propensities toward commission of a particular tort, have the opportunity and ability to control the child, and have made no reasonable effort to correct or restrain him.

3. Parent and Child § 8— action against parents for tort of child—summary judgment

Summary judgment was properly entered for defendant parents in an action based on negligent supervision of their child who struck the minor plaintiff with a cast where there was evidence that defendant mother, who was aware of the child's tendency to strike other persons with his cast, had instructed the child never to hit anyone again, and where there was no evidence that defendant father was aware of the child's tendency to hit others with his cast.

APPEAL by plaintiffs from *Martin, J. C., Judge*. Judgment entered 16 December 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 8 March 1984.

This is an action brought by plaintiff Karen Sue Anderson, individually and as guardian ad litem, to recover damages for injuries sustained when her son Michael was struck in the mouth by a cast worn on the right arm of Clem Lee Canipe, III, minor child of defendants Clem Lee Canipe and Gaynell Canipe.

Brumbaugh & Donley, by Patrick M. Donley, for plaintiff-appellants.

White, Allen, Hooten, Hodges & Hines, P.A., by John R. Hooten, for defendant-appellees.

JOHNSON, Judge.

On 27 October 1980, Paul Michael Anderson and defendant Clem Lee Canipe, III were in the school yard of Summersill Elementary School. Clem was wearing a cast on his right arm and an ace bandage on his right ankle. While talking with Clem about his sprained ankle, Michael began twisting Clem's ankle. When he twisted Clem's ankle a second time, Clem struck Michael on the head and in the mouth with his right arm, chipping two of Michael's upper front teeth. In their complaint, plaintiffs implied that the blows to Michael's head and mouth were intentional and

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that they resulted in actual damages of \$1,575.00. They also alleged that Clem Lee Canipe and Gaynell Canipe, parents of Clem, were negligent in that they failed to supervise and restrain their child from abusing and assaulting Michael and other children with his cast. Defendants in their answer admitted that "a collision occurred between a cast which was on the right arm of Clem Lee Canipe, III and Paul Michael Anderson," causing the injuries to Michael's mouth, of which plaintiffs complained. They denied, however, that the blow was intentional and that the defendant-parents were negligent in supervising their child.

On the basis of their pleadings and depositions, defendants moved for and were granted summary judgment. Plaintiffs except and assign as error the granting of defendants' motion for summary judgment. They contend that a genuine issue of material fact exists as to whether the injury suffered resulted from the intentional misconduct of minor defendant Clem Lee Canipe, III.

Rule 56(c) of the Rules of Civil Procedure provides, in part, that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). An issue is genuine if it may be maintained by substantial evidence. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). An issue is material if the facts alleged would constitute or would irrevocably establish any material element of a claim or defense. *Bernick v. Jurden*, *supra* at 440, 293 S.E. 2d at 409. To prevail on their motion for summary judgment, defendants have the burden of establishing by uncontroverted evidence the absence of any genuine issue of material fact. *Id.*

[1] In the instant case, the pleadings, affidavits, and depositions clearly present a genuine issue of material fact. Plaintiffs alleged, in effect, that Clem intentionally struck Michael. Defendants, on the other hand, admitted that Clem's right arm, which was in a cast, came in contact with Michael's mouth, but they deny, categorically, that the contact was intentional. It is readily apparent that the real dispute to be resolved between the parties is whether the injury resulted from intentional wrongdoing. It is

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equally apparent that this is a material fact since it would establish a material element, of plaintiffs' claim of battery—*intent*. Therefore, we conclude that summary judgment as to minor defendant, Clem Lee Canipe, III was improperly granted.

Plaintiffs also contend that the court erred in granting summary judgment in favor of Clem and Gaynell Canipe, parents of minor defendant. They argue that a genuine issue of material fact exists as to whether the defendant parents were negligent in failing to supervise and control their minor child.

[2] In general, parents are not liable for the torts of their minor children solely by reason of their parent-child relationship. *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962). Liability may be imposed on parents, however, if they know, or in the exercise of reasonable care should have known of the child's habits, tendencies, or propensities toward commission of a particular tort, have the opportunity and ability to control the child and have made no reasonable effort to correct or restrain him. *Id.* at 139, 128 S.E. 2d at 213. In such cases, the liability of the parents is based on their own negligence and not upon the parent-child relationship. *Id.*; *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959). Thus, to prevail on their claim of negligent supervision, plaintiffs must show: (1) that the defendant parents knew or should have known of their child's tendency to use his cast to strike others; and (2) that the defendant parents failed to exercise due care to control his misconduct.

[3] There is evidence in the record from which a jury could properly find that the defendant mother was aware of Clem's tendency to hurt other individuals with his cast. There is no evidence, however, tending to show that the defendant mother failed to make a reasonable effort to correct or restrain her child. Plaintiffs' evidence, to the contrary, contains a sworn statement that the defendant mother had instructed her son never to hit anyone ever again. We are not directed by plaintiffs to any evidence showing that the defendant father was aware of the child's tendency to hit others with his cast. Nor is there any evidence tending to show that the defendant father failed, in the exercise of reasonable care, to exert parental control over the child.

While the granting of summary judgment is a drastic remedy and should be granted cautiously, summary judgment is appropri-

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ate when the non-moving party, as in the present case, cannot produce evidence of an essential element of his claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Since the record affirmatively discloses the absence of evidence tending to establish the essential elements of plaintiffs' claim of negligent supervision, summary judgment in favor of the defendant parents was proper.

Finally, we note summarily that the minor plaintiff's claim is not barred by the statute of limitations. The statute of limitations began to run against the minor plaintiff's claim upon appointment of his guardian ad litem. *Trust Co. v. Willis*, 257 N.C. 59, 125 S.E. 2d 359 (1962); *Lane v. Surety Co.*, 48 N.C. App. 634, 269 S.E. 2d 711 (1980), *disc. rev. denied*, 302 N.C. 219, 276 S.E. 2d 916 (1981).

For the reasons stated, summary judgment in favor of the minor defendant Clem Lee Canipe, III is reversed and summary judgment in favor of defendants Clem Lee Canipe and Gaynell Canipe is affirmed.

Affirmed in part and reversed in part.

Judges HEDRICK and WHICHARD concur.

WILLIAM GERALD PLEASANT v. VICTOR LEE JOHNSON

No. 8314SC97

(Filed 3 July 1984)

Master and Servant § 89.1; Appeal and Error § 4— workers' compensation—negligence of fellow employee—common law action barred—new theory on appeal improper

The trial court properly directed a verdict against plaintiff on the ground that the exclusive remedy provisions of the Workers' Compensation Act barred his action for injuries inflicted by the negligence of defendant, a co-employee; moreover, plaintiff could not claim on appeal that the facts clearly showed that defendant committed an intentional tort and the trial court therefore erred in holding his action barred, since plaintiff's complaint was grounded solely on negligence, and the court on appeal cannot consider additional theories raised for the first time on appeal.

Chief Judge VAUGHN dissenting.

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APPEAL by plaintiff from *Godwin, Judge*. Judgment entered 30 September 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 January 1984.

McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for plaintiff appellant.

Bryant, Drew, Crill & Patterson, P.A., by Lee A. Patterson, II, for defendant appellee.

EAGLES, Judge.

We consider in this case whether the trial court properly directed a verdict against plaintiff on the ground that the exclusive remedy provisions of the Workers' Compensation Act (the Act), codified at N.C. Gen. Stat. §§ 97-1 to -122 (1979 & Supp. 1983), bar his action for injuries inflicted by the negligence of defendant, a co-employee. Although strong policy reasons for a contrary result exist, we conclude that the trial court applied North Carolina law correctly, and we affirm.

I

Plaintiff, William Gerald Pleasant, and defendant, Victor Lee Johnson, returned from lunch in separate vehicles to the construction site where they worked. Pleasant and another fellow worker arrived first, got out of their car, and walked across the parking lot toward the job site. Pleasant's companion saw Johnson's truck approaching them and jumped out of the way, yelling a warning to Pleasant. Johnson's truck struck Pleasant before he could get out of the way, seriously damaging Pleasant's right knee. Pleasant received disability benefits under the Workers' Compensation Act. He filed the present action to recover tort damages for Johnson's wrongful negligence. Johnson, called as an adverse witness at trial, admitted that he was "just messing around" and did not mean to hit Pleasant but only to scare him. At the close of Pleasant's evidence, Johnson obtained a directed verdict.

II

Johnson stated as grounds for his motion for a directed verdict the following: "the facts . . . as relate to the previously presented plea in bar presented heretofore on the grounds of a summary judgment motion." Pleasant contends these are unsuffi-

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cient grounds. See N.C. Gen. Stat. § 1A-1, Rule 50(a) (1983). No objection to the sufficiency of the grounds appears in the record, however; and the import of the motion plainly appears from the Answer, an earlier appeal, and the pretrial order. Pleasant's argument is thus without merit. See *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974) (rule not inflexible when grounds apparent); *Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E. 2d 433 (1978) (failure to object to lack of grounds waives issue on appeal).

III

The provisions of the Workers' Compensation Act, when read together, preclude actions by employees covered by the Act against negligent co-employees for injuries arising out of and in the course of their employment. G.S. §§ 97-9, -10.1 (1979); *Strickland v. King*, 293 N.C. 731, 239 S.E. 2d 243 (1977). Our Supreme Court has held that this exclusion extends even to "reckless and wanton" behavior. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960). Neither side denies that Pleasant's injury arose out of and in the course of his employment. See *Altman v. Sanders*, 267 N.C. 158, 148 S.E. 2d 21 (1966) (parking lot cases); *Chambers v. Union Oil Co.*, 199 N.C. 28, 153 S.E. 594 (1930) (horseplay in the course of employment). Nevertheless, Pleasant brought his action in negligence; the trial court's instructions to the jury at recess indicated its understanding that this was a "negligence action"; and Pleasant requested a directed verdict in his favor solely on negligence grounds. Thus, as the case was presented, the trial court did not err in granting Johnson's motion. *Wesley v. Lea*.

IV

Pleasant now contends that the facts clearly show that Johnson committed an intentional tort, and, therefore, the trial court erred in holding his action barred. He relies on our decision in *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982). In *Andrews*, we held that the provisions of the Act do not preclude an employee from recovering both compensation benefits and damages for injuries caused by a co-employee's assaultive behavior, if the injured employee reimburses the employer for any duplicative recovery. Prior to *Andrews*, Pleasant would probably have had to elect between his common law remedy and recovery under the

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Act. See *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952) (assault by employer). This may explain the grounding of Pleasant's complaint (filed 9 January 1981) solely in negligence. However, this Court filed *Andrews* on 15 December 1981, and followed *Andrews* in *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E. 2d 582 (filed 2 February 1982). Although trial in this case did not take place until September 1982, Pleasant made no effort to amend his complaint. Moreover, the pretrial order, approved and filed 27 September 1982, discloses only issues of negligence. The same evidence supports the theory of assault now raised on appeal and the theory of negligence tried below. On virtually identical procedural facts, we have recently held that this Court cannot consider additional theories raised for the first time on appeal, of which defendant had no notice at trial. *Gilbert v. Thomas*, 64 N.C. App. 582, 307 S.E. 2d 853 (1983). See also *State v. Cooke*, 306 N.C. 117, 291 S.E. 2d 649 (1982); *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, --- S.E. 2d --- (filed 6 March 1984). Therefore, the directed verdict for Johnson must be affirmed. *Gilbert v. Thomas*.

The effect of this decision is, unfortunately, that Pleasant is limited to his recovery under the Act and that Johnson, despite inexcusably careless behavior, escapes any liability for his action. North Carolina continues to preclude all negligence actions against co-employees, although the modern trend is to the contrary. See 2A A. Larson, *The Law of Workmen's Compensation* § 72.10 *et seq.* (1983). As this Court noted in *Andrews v. Peters*, the immunity provisions of the Act reflect a policy recognition that accidents caused by fellow employees are an inevitable feature of the industrial workplace, and that employers, rather than employees, should bear the cost of such accidents. We recognized, however, that this policy should not serve as a shield for the intentional wrongdoer. *Id.* Intentional misconduct, while certain to occur, does not present the type of risk that employers or employees must guard against at their own peril. See W. Prosser, *The Law of Torts* § 33 (4th ed. 1971); *Bryan v. Utah Int'l*, 533 P. 2d 892 (Utah 1975). Significantly, no substantial policy reason exists for requiring them to guard against recklessly negligent conduct of the sort engaged in here by Johnson. See *Larson, supra*. A rule which simply distinguishes between negligent and intentional acts focuses inordinate attention on the subjective intent of

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the co-employee, as opposed to the *foreseeable* risks of the workplace which the Act protects against. The law of this State is clear, however, and we must therefore follow it until the General Assembly decides otherwise.

V

Because we have affirmed the directed verdict in favor of Johnson, the issue of whether Pleasant's motion was properly denied becomes moot. Pleasant has shown no error, and the judgment is, therefore,

Affirmed.

Judge HILL concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

Plaintiff alleged, among other things, that:

4. Defendant was willfully, recklessly and wantonly negligent in that he was operating the motor vehicle in such a fashion *so as to see how close he could operate the said motor vehicle to the plaintiff without actually striking him but*, misjudging his ability to accomplish such a prank, actually struck the plaintiff with the motor vehicle he was operating.

Defendant's own testimony includes the following:

Q. You did hit him?

A. Yes, sir.

Q. You don't claim the brakes or steering on the vehicle or anything failed, do you?

A. No, sir.

Q. You meant to come close, but you missed?

A. Yes, sir.

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Q. Did you believe that was a dangerous thing to do at the time?

A. Yes, sir.

Q. It is true though, is it not Mr. Johnson, that at the time the van struck Mr. Pleasants you were trying to put a fright or a scare into him by operating the van close to him?

A. Yes, sir.

Q. That is true?

The allegations and proof, therefore, would permit the jury to find that plaintiff was injured as a result of an intentional wrongful act by defendant. It is not necessary for defendant to have intended the actual results of his intentional wrongful act. The results of his intentional wrongful act were just as foreseeable as if he had aimed a pistol at defendant instead of a truck. For the reasons stated in *Andrews v. Peters*, I vote to reverse.

MATTIE CAUDLE AND HUSBAND, LANCY CAUDLE, SR.; KATHRYN H. PERCELL AND HUSBAND, ROBERT LOUIS PERCELL; JAMES BULLOCK; THEATRICE BULLOCK; LONNIE BULLOCK; AND W. H. HOLDING v. HERMAN RAY

No. 8310SC377

(Filed 3 July 1984)

Judgments § 21.1— consent judgment—authority of attorney—necessity for finding of fact

A proceeding wherein plaintiffs moved to set aside a consent judgment is remanded for proper findings by the trial court as to whether plaintiffs' attorney had the authorization of plaintiffs to institute an action against defendant and to sign the consent judgment on their behalf.

APPEAL by defendant, Herman Ray, and plaintiffs Mattie Caudle, Lancy Caudle, Sr. and W. H. Holding from *Hobgood, Judge*. The Order appealed from was entered 15 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 6 March 1984.

Caudle v. Ray

This is a civil proceeding wherein plaintiffs moved to set aside a consent judgment entered in this matter on 18 May 1977. Plaintiffs seek to set aside the consent judgment on the grounds that: (1) Attorney Earl L. Purser, who was retained to draft a timber deed for plaintiffs, brought suit against defendant Herman Ray purportedly on behalf of all plaintiffs but Lancy Caudle, Sr. was the only plaintiff to have knowledge that the suit was filed; (2) that Attorney Purser consented to the appointment of a referee and to the judgment in this cause; and (3) that plaintiffs did not learn of the judgment against them until efforts were made to execute on the judgment.

After considering all the evidence, the trial court ruled that the consent judgment was valid and binding on Mattie Caudle, Lancy Caudle, Sr. and W. H. Holding, and that plaintiffs' motion to set aside the consent judgment was allowed as to Kathryn H. Percell, Robert Louis Percell, James Bullock, Theatrice Bullock and Lonnie Bullock.

From the order declaring the consent judgment valid and binding, as to Mattie Caudle, Lancy Caudle, Sr., and W. H. Holding, these plaintiffs appeal. Defendant Ray appeals that portion of the order setting aside the consent judgment as to plaintiffs Kathryn H. Percell, Robert Louis Percell, James Bullock, Theatrice Bullock and Lonnie Bullock.

Shyllon & Burford, by Mohamed M. Shyllon, for plaintiff appellants.

Parker, Sink, Powers, Sink & Potter, by Henry H. Sink, for defendant appellant and defendant appellee.

JOHNSON, Judge.

On 22 June 1979, plaintiffs filed a motion in the cause pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside the consent judgment entered in this matter on 18 May 1977. Plaintiffs alleged that the consent judgment was entered without their knowledge and consent. Plaintiffs averred that in January of 1976 they retained Attorney Earl R. Purser to draft a timber deed for the sale of timber standing on land plaintiffs believed they owned as tenants in common. The deed was drafted but the grantee was prevented from removing the timber by defendant Herman Ray.

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On 26 March 1976, Attorney Purser filed a complaint, allegedly on plaintiffs' behalf, asking the court to restrain defendant Ray from interfering with plaintiffs' peaceful possession and from interfering with the removal of timber from plaintiffs' land. This action instituted in the names of all plaintiffs was not verified by any of them.

In his verified answer and counterclaim, defendant claimed ownership of the property in question and counterclaimed for \$10,000 as damages allegedly resulting from plaintiffs cutting and removing of timber from said property. In addition, defendant claimed ownership of said property by adverse possession.

At the pre-trial conference held on 16 December 1976, the parties agreed to the appointment of a referee and to be bound by the reference report. According to Attorney Purser, Mattie and Lancy Caudle, Sr. and an unidentified third person participated in the pre-trial conference.

On 18 May 1977, consent judgment was entered wherein the boundary lines between the lands of plaintiffs and defendant were established, and fees for reference were taxed to the plaintiffs. The consent judgment was signed by the attorneys for both parties. Plaintiffs' motion to set aside the consent judgment was denied on 28 March 1980, at which time plaintiffs gave notice of appeal.

On initial appeal, this Court, after finding no evidence in the record to support the trial court's conclusion that Attorney Purser acted within the scope of his authority, remanded the cause for further proceedings. *Caudle v. Ray*, 50 N.C. App. 641, 645, 274 S.E. 2d 880, 883 (1981). On remand, the trial court once again denied plaintiffs' motion to set aside the consent judgment. Plaintiffs gave notice of appeal in open court on 19 August 1981.

On 1 March 1982, the parties stipulated that the record of the testimony of the witnesses at the 19 August 1981 hearing was lost. Therefore, a rehearing on plaintiffs' motion was set for 13 December 1982. At the rehearing, the court, without making findings of fact, allowed the motion to set aside the consent judgment as to all plaintiffs except Lancy Caudle, Sr., Mattie Caudle, and W. H. Holding.

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The essential question before the trial court was whether plaintiffs were entitled to relief from the consent judgment on the grounds that Attorney Purser did not have the authorization of plaintiffs to institute the cause of action against defendant Ray and to sign the consent judgment on their behalf. This Court held that "[i]t is the duty of the judge presiding at a Rule 60(b) hearing to make findings of fact and to determine from such facts whether the movant is entitled to relief from a final judgment or order." *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E. 2d 901, 903 (1978). *U.S.I.F. Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 614, 219 S.E. 2d 787 (1975). Our Supreme Court in addressing the issue almost identical to the one in the case at bar, stated that:

The primary question for the court below was whether or not the attorney of record had authority from appellants to compromise and settle the matters in controversy and approve a judgment in retraxit disclaiming on their behalf any right, title or interest in the land in question. There are no findings of fact determining this question. [Therefore], the cause *must* be remanded for this determination. . . . (Emphasis ours.)

The Court remanded the case for further findings of fact. *Howard v. Boyce*, 254 N.C. 255, 266, 118 S.E. 2d 897, 905 (1981).

The record in the case *sub judice* does not contain any findings of fact determining the essential question of whether Attorney Purser had the authorization of plaintiffs to institute the cause of action against defendant Ray and to sign the consent judgment on their behalf. Since the record is devoid of any findings of fact, the Court is prevented from conducting an effective review of the question presented. Consequently, the trial court's order of 15 December 1982 must be vacated and the case remanded for further proceedings.

Vacated and remanded.

Judges HEDRICK and HILL concur.

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ALICE L. BIGGS v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC.

No. 8312SC408

(Filed 3 July 1984)

1. Physicians, Surgeons, and Allied Professions § 15.2— nurse's aide—qualification to testify as expert

A witness was qualified to give opinion testimony as to the approved practices of nurse's aides in helping convalescing patients to take showers where the witness testified that she completed a nurse's aide training course and was certified as a nurse's aide; she had taken additional classes toward a higher certification; she had worked as a nurse's aide in a hospital for two and one-half years; she had observed the practices of nurse's aides while a patient in three different hospitals; and she knew the practices and standards of nurse's aides in eastern North Carolina with respect to assisting convalescing patients to take showers.

2. Physicians, Surgeons, and Allied Professions § 21— medical malpractice action— statement of damages sought—jury argument as to greater damages

In a medical malpractice action, defendant hospital was not entitled to a new trial because plaintiff's counsel, pursuant to a request from defense counsel under G.S. 1A-1, Rule 8(a)(2) for the amount of monetary relief sought, stated an amount of \$75,000 and thereafter argued to the jury, without amending the statement, that the evidence showed plaintiff had been damaged in excess of \$176,000.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 11 November 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 7 March 1984.

Plaintiff sued to recover damages for injuries allegedly resulting from defendant's neglect while she was a patient at Cape Fear Valley Hospital, which defendant owns and operates. Recuperating from back surgery, she fell and broke her wrist after taking a hot shower, in which she was assisted by Mary Avina, a nurse's aide employed by defendant. Two hot showers a day was part of her recovery therapy and in taking them she required the assistance of a nurse's aide. According to plaintiff's testimony the events leading to the injury were as follows: Ms. Avina helped her out of bed, across the hospital room, and into the adjoining bathroom and shower stall. After standing under the warm shower for several minutes and feeling weak, plaintiff called out for assistance several times, but there was no response. She then got out of the shower, looked into the hospital room, saw no one, and started into the room, but was startled by a

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knock on the room door leading to the hallway, and stepped back onto the wet bathroom floor and fell. According to Ms. Avina's testimony, however, the incident happened as follows: She helped plaintiff into the shower, told her she was going to make up the bed, and after plaintiff completed her shower and asked for assistance she turned off the water, helped plaintiff out of the shower, and dried her off. While she was turning around to get plaintiff's gown out of the hospital room, there was a knock on the room door and when she turned back around plaintiff was on the floor. Following a jury trial verdict was rendered in plaintiff's favor for \$50,000 and judgment entered thereon.

Barrington, Jones, Armstrong & Flora, by Carl A. Barrington, Jr. and C. Bruce Armstrong, for plaintiff appellee.

Clark, Shaw, Clark & Bartelt, by John G. Shaw, for defendant appellant.

PHILLIPS, Judge.

[1] Whether defendant's employee was negligent in failing to assist plaintiff after the shower bath was completed was the main issue in the case. In undertaking to prove the affirmative of that issue plaintiff was permitted, over defendant's objection, to present opinion testimony by Lillie Faircloth as to the approved practices of nurse's aides in helping convalescing patients that take shower baths. Defendant contends the witness was not qualified to testify as an expert in that field and that the court erred in permitting her to do so. We disagree. The witness's qualifying testimony with respect to her knowledge of the work, duties and practices of nurse's aides was that: She completed a nurse's aide training course at Sampson Memorial Hospital, in neighboring Sampson County; was certified as a nurse's assistant/nurse's aide; had taken additional classes toward higher certification; had worked as a nurse's aide at Sampson Memorial Hospital for approximately two and one-half years; had observed the practices of nurse's aides in Cape Fear Valley Hospital, North Carolina Memorial Hospital and a county hospital in Goldsboro while a patient in those hospitals; and knew the practices and standards of nurse's aides in eastern North Carolina with respect to assisting convalescing patients that take shower baths. This evidence clearly supports the judge's finding that the witness was qualified to

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give opinion testimony in the field involved, which, under well established authority, requires that the ruling be affirmed. 1 Brandis N.C. Evidence § 133 (1982); *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). Though the fields in which expert testimony can properly be received are innumerable, 1 Brandis N.C. Evidence § 134 (1982), and it was certainly appropriate for Ms. Faircloth to testify as an expert in this case, since she manifestly knew more about the functions and practices of nurse's aides than the jurors did, *Cogdill v. N.C. State Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971), we do not want to be understood as holding that expert testimony was necessary in this case; because, for the reasons stated in discussing defendant's final assignment of error, we do not think it was.

[2] In compliance with Rule 8(a)(2) of the N.C. Rules of Civil Procedure, plaintiff's complaint did not specify the amount of damages sought, other than that they were "in excess of \$10,000.00." Pursuant to the same rule, before trial defendant requested plaintiff to state the amount of damages sought and plaintiff's reply was \$75,000. During closing argument to the jury, plaintiff's attorney argued that the evidence presented showed that she had been damaged in excess of \$176,000. Defendant did not object during argument, but did after its conclusion, and no amendment to plaintiff's damages request was made. Defendant contends that since the \$75,000 response was not amended plaintiff was bound by it under Rule 8(a)(2) and the argument made necessarily entitles it to a new trial. Rule 8(a)(2) has no such effect, in our opinion, and this assignment of error is overruled.

Rule 8(a)(2) of the N.C. Rules of Civil Procedure provides in part:

[I]n all professional malpractice actions, including actions against health care providers . . . wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000): Provided that at any time after service of claim for relief, any party may make request of claimant for written statement of the amount of monetary relief sought, and claimant shall, within 10 days after service of

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such request, serve said statement upon the requesting party, provided that said statement shall not be filed with the court until the action has been called for trial or until entry of default is requested. Provided, any statement of "the amount of monetary relief sought" which is served on an opposing party may be amended in the manner and at the time provided by G.S. 1A-1, Rule 15.

In *Jones v. Boyce*, 60 N.C. App. 585, 587, 299 S.E. 2d 298, 300 (1983), another panel of this Court noted that:

The General Assembly enacted G.S. 1A-1, Rule 8(a)(2), in response to a perceived crisis in the area of professional liability insurance. A study commission thereon recommended "elimination of the ad damnum clause in professional malpractice cases [to] avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded." *Report of the North Carolina Professional Liability Insurance Study Commission*, March 12, 1976, p. 33. Rather than eliminating the clause entirely, the Assembly chose to follow the Wisconsin approach in which "only a jurisdictional amount is named. . . ."

Manifestly, this part of Rule 8(a)(2) was enacted to reduce the believed impact of pre-trial publicity about medical malpractice cases, and for no other purpose. It has no bearing on the damages that a victim of medical negligence is entitled to recover, as the longstanding rule that damages in this state are governed by the evidence presented, rather than the claim made for relief, still abides except in cases of default. Rule 54(c), N.C. Rules of Civil Procedure; *Griggs v. Stoker Service Co.*, 229 N.C. 572, 50 S.E. 2d 914 (1948); *Harris v. Ashley*, 38 N.C. App. 494, 248 S.E. 2d 393 (1978); 10 Strong's N.C. Index 3d, *Pleadings* § 7 (1977). Nor does this provision curtail the rights that counsel in this state have long had to argue the facts in evidence and all reasonable inferences drawable therefrom. G.S. 84-14; *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E. 2d 596 (1982); *State v. Locklear*, 291 N.C. 598, 231 S.E. 2d 256 (1977); *Howard v. Western Union Telegraph Co.*, 170 N.C. 495, 87 S.E. 313 (1915). Defendant's further contention that the concluding part of the provision which permits damages

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statements to "be amended in the manner and at the time provided by G.S. 1A-1, Rule 15" requires a new trial when a party argues for relief in excess of the amount stated without amending the statement is likewise without merit. To so construe the provision would subvert substance to form for no rational purpose and nothing in the enactment indicates that that was the Legislature's purpose. Furthermore, since the verdict was for less than the \$75,000 that plaintiff stated she was seeking, the argument was harmless in any event.

Defendant's final contention that the evidence was insufficient to support the verdict is equally unavailing. Even in the absence of expert testimony as to the practices and standards of nurse's aides, evidence that because of her weakened condition plaintiff required assistance in taking the hot showers prescribed by her doctor, that defendant's employee knew this, and after assisting her into the shower was not available when plaintiff needed to leave it, raised an issue of fact for the jury. And in deciding it, the jury accepted plaintiff's version of the incident, rather than defendant's, which was their province and right.

No error.

Chief Judge VAUGHN and Judge HILL concur.

DONALD R. PAYNE, RICHARD C. HILL, JR., J. HAROLD KING, GRADY C. BECK, MELVIN DOUGLAS PEED AND WIFE, MARY ROSE BROWN PEED, AS TENANTS BY THE ENTIRETY, GEORGE W. ODELL, III, MORRIS A. HERRON AND WIFE, SARAH H. HERRON, AS TENANTS BY THE ENTIRETY, AND RONNY G. ODELL AND WIFE, KATHLEEN W. ODELL, AS TENANTS BY THE ENTIRETY v. BUFFALO REINSURANCE COMPANY

No. 8322SC286

(Filed 3 July 1984)

Insurance § 135.1— fire insurance—payment to mortgagee—subrogation or assignment—election

Where defendant, pursuant to an insurance contract between the parties, refused to pay mortgagor-owner plaintiffs any part of the fire loss claimed but did pay the seller-mortgagee the mortgage balance and received an assignment of a note and deed of trust executed by plaintiffs at the time of purchase,

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plaintiffs subsequently sued defendant claiming the policy limits were due them because of the fire in their building, defendant alleged that because of the payments it had made under the policy it was subrogated to the seller-mortgagee in the amount of the mortgage balance and counterclaimed for that amount, summary judgment was entered against plaintiffs on their claim and against defendant on its counterclaim, and neither party appealed therefrom, the trial court properly concluded that defendant made a binding election by counterclaiming as a subrogee in the prior action and ordered the deed of trust and assignment cancelled, since the insurance policy provided that defendant was at liberty to proceed against plaintiffs *either* as a subrogee of the mortgage *or* as an assignee of the mortgage, but it could not do both.

APPEAL by defendant from *Collier, Judge*. Judgment entered 22 December 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 10 February 1984.

Plaintiffs, owners of a factory building and the land it is situated on, sued to remove as a cloud on their title a deed of trust that defendant holds as an assignee of plaintiffs' mortgagee. In buying the property in 1978 plaintiffs gave a note and deed of trust to the seller in the amount of \$391,500. Soon thereafter, they and their tenant, a manufacturer of polyfoam for the furniture industry, purchased a fire policy from defendant insuring the factory building for \$1,000,000 and the contents for \$500,000. The policy contains a mortgage clause, more or less standard in the industry, which states that the mortgagees' interests under the policy cannot be invalidated by improper or negligent acts of the insureds. With respect to the possible forfeiture of the insureds' right to the policy proceeds, the clause further provides:

IF THIS COMPANY SHALL CLAIM THAT NO LIABILITY EXISTED AS TO THE MORTGAGOR OR OWNER, IT SHALL TO THE EXTENT OF PAYMENT OF LOSS TO THE MORTGAGEE BE SUBROGATED TO ALL THE MORTGAGEE'S RIGHTS OF RECOVERY BUT WITHOUT IMPAIRING MORTGAGEE'S RIGHT TO SUE; OR IT MAY PAY OFF THE MORTGAGE DEBT AND REQUIRE AN ASSIGNMENT THEREOF AND OF THE MORTGAGE.

In April, 1980 when a fire destroyed the insured building, defendant claimed it was not liable to the mortgagor-owner plaintiffs because of various acts on their part and refused to pay them any part of the loss claimed. On July 31, 1980 it did pay the seller-mortgagee the mortgage balance of \$378,893.67, however, and received an assignment of the note and deed of trust, which were recorded on January 8, 1981. On January 13, 1981 plaintiffs sued

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defendant, claiming the policy limits of \$1,000,000 were due them because of the fire. In the answer, after asserting several defenses based on technical grounds, as well as misdeeds by plaintiffs or their agents, defendants alleged that because of the payments it had made under the policy it was subrogated to the seller-mortgagee in the amount of \$378,893.67 and counterclaimed against plaintiffs for that amount. In February, 1982 summary judgment was entered against plaintiffs on their claim and against defendant on its counterclaim, and neither party appealed therefrom.

In October, 1982 this action was filed to cancel the deed of trust which defendant still holds as assignee of the seller-mortgagee. Jury trial was waived. After a hearing, Judge Collier found and concluded that defendant made a binding election by counterclaiming as a subrogee in the prior action, and ordered the deed of trust and assignment cancelled.

White and Crumpler, by William E. West, Jr., for plaintiff appellees.

Tuggle, Duggins, Meachan, Thornton & Elrod, by Joseph F. Brotherton, for defendant appellant.

PHILLIPS, Judge.

Only one legal question is raised by this appeal—Was the judgment cancelling defendant's deed of trust of record authorized by law? It was, in our opinion, and the judgment of the trial court is affirmed.

The judgment was authorized by the express terms of the contract between the parties. An insurance policy is but a special kind of contract and the terms agreed to therein, unless forbidden by law, are binding on insurer and insured alike. No statute or other law of this state prohibits an insurance company from agreeing to pursue only one of two courses against an insured mortgagor when payment has been made to the mortgagee and it is claimed that the policy rights of the owner-mortgagor have been forfeited. But to the contrary; our General Assembly by enacting G.S. 58-176, which established the "Standard Fire Insurance Policy for North Carolina," required that just such a provision be put in every fire insurance policy written in this state.

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In doing so the legislative purpose, no doubt, was to prevent insurance companies from taking more than one legal course against insured mortgagors in situations like this, relieve insured mortgagors from the necessity of dealing with more than one proceeding, claim or position, and expedite the conclusion of controversies involving alleged misconduct by insured mortgagors. The terms selected by the Legislature to effectuate these purposes are clear; if they were not, the ambiguities would, of course, have to be construed against the insurer under fundamental principles of law. But the terms are not ambiguous; the disjunctive "or" is not a synonym for the subjunctive "and," and the meaning of the terms approved by the Legislature and used by the defendant company cannot be mistaken. What they mean and say is that upon paying policy proceeds to the mortgagee, rather than the mortgagor insureds, and claiming that their interests had been forfeited, the company was at liberty, as it saw fit, to proceed against the plaintiffs *either* as a subrogee of the mortgage *or* as an assignee of the mortgage; but it could not do both. That, under the facts of this case, the remedies of subrogation and assignment may not be contradictory or repugnant to each other, as defendant argues, is beside the point. It is enough that they are different and distinctive rights and remedies and the policy limited defendant to exercising only one of them. Subrogation is an equitable remedy in which one steps into the place of another and takes over the right to claim monetary damages to the extent that the other could have, 73 Am. Jur. 2d *Subrogation* § 1 (1974); whereas, an assignment is the formal transfer of property or property rights, 6 Am. Jur. 2d *Assignments* §§ 1, 3 (1963). The property or property right transferred by the assignment in this case was a recorded deed of trust containing foreclosure powers on plaintiffs' real property, which, of course, is distinguishable from the rights defendant acquired by subrogation. Since the rights and remedies are quite different, and defendant actively and formally pursued its subrogation rights in the previous litigation between the parties by seeking to obtain a money judgment on that ground, and chose not to assert its rights under the mortgage, those rights cannot be successfully asserted now in this action. They have been abandoned under the terms of the policy, as Judge Collier ruled.

We emphasize that the binding election that defendant made was under the terms of the contract, rather than under the law of

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election of remedies, which has no application to this case, in our opinion. We do this because the briefs indicate that the parties are under the impression that in entering judgment the judge did so in accord with his understanding of the law of election of remedies. The judgment does not so state, but rather declares that "defendant made an election of remedies available to it under said insurance policy." In all events, for there to be an election of remedies under the law of that subject, "the two remedies must be inconsistent with each other, and not analogous, consistent, and concurrent." 28 C.J.S. *Election of Remedies* § 13, pp. 1086-1087 (1941); whereas in this case, so far as we can see, the rights of subrogation and assignment were neither contradictory nor incompatible with each other. But even if the judgment had been mistakenly entered under the law of election of remedies, our decision on this appeal would not be affected, since the judgment is valid under the law of contracts, and it is common learning that a judgment that is correct must be upheld even if it was entered for the wrong reason. 5 Am. Jur. 2d *Appeal and Error* § 785 (1962).

Since the judgment is affirmable on the grounds stated, plaintiffs' contention that it was also authorized by the doctrine of *res judicata*, though interestingly presented, need not be determined.

Affirmed.

Judges WELLS and BRASWELL concur.

BELVA ELIZABETH BRADLEY HOWARD, JOSEPH B. HOWARD, CAROLYN HOWARD PRICE, LINDA HOWARD HAYNES, BILLY HOWARD, BRUCE HOWARD, BELVA HOWARD SMELTZER, NANCY HOWARD DOTSON AND DAVID HOWARD v. MONA HOWARD SHARPE, JIMMY ROGER HOWARD, VERA HOWARD, AND RENEE BARTLETT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM ESLEY HOWARD, DECEASED

No. 8328SC256

(Filed 3 July 1984)

Marriage § 2— sufficiency of evidence of marriage

The evidence was sufficient to support the jury's finding that plaintiff was the lawful wife of the deceased where it tended to show that plaintiff and

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deceased held themselves out to the community as being married; they told other persons that they had become married; plaintiff and deceased sold property together, executed deeds of trust together, maintained joint bank accounts, filed joint tax returns, and owned joint cemetery lots; and plaintiff quit her job in order to stay home with the deceased and care for him in the last few months of his illness.

APPEAL by defendants from *Lewis, Judge*. Judgment entered 8 October 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 February 1984.

This action was instituted by plaintiff, Belva Elizabeth Bradley Howard and her eight children, allegedly fathered by William Esley Howard, the deceased, against Renee Bartlett, Administratrix of the Estate of William Esley Howard, deceased and the three children (Mona Howard Sharpe, Jimmy Roger Howard, and Vera Howard) born of the marriage between the deceased William Esley Howard and Kathryn Redmond. By their complaint, plaintiffs sought to have Belva Elizabeth Bradley Howard (hereinafter "Belva") declared the lawful wife of William Esley Howard (hereinafter "the deceased") and that real property held by Belva and the deceased at the time of his death be declared property held by the entirety and that Belva be declared the sole owner. From a jury verdict and judgment that Belva was the lawful wife of the deceased as alleged in the complaint, defendants appeal.

Lentz, Ball and Kelley, P.A., by E. L. Ball, Jr., and Gudger, Reynolds, Ganly and Stewart, P.A., by Joseph C. Reynolds, for plaintiff appellees.

Bruce J. Brown, for defendant appellants.

JOHNSON, Judge.

The evidence in this case is uncontradicted and shows the following: The deceased and Kathryn Redmond were married to each other in 1945 and three children were born of this union, defendants: Mona Howard Sharpe, Jimmy Roger Howard, and Vera Howard. In June of 1948, the deceased and Kathryn Redmond separated. Belva and the deceased commenced living together sometime in 1948 and lived together until the deceased's death in May, 1981. The deceased and Kathryn Redmond were divorced on 25 July 1959. Belva testified that she and the deceased

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were married to each other in October, 1959 in South Carolina. Irene Howard Owenby, the sister of the deceased, testified that in a conversation she had with the deceased in 1958 or 1959, while the deceased was living with Belva and before he divorced Kathryn Redmond, the deceased told her that as soon as he obtained his divorce from Kathryn he and Belva were going to get married. Melva Bradley testified that at or about 9 a.m. on the 28th or 29th of October, 1959, the deceased asked her and her husband to keep the children so that he and Belva could go to South Carolina to get married. Belva and the deceased returned late in the evening and thanked them for keeping the children. Belva showed her a piece of paper and said, "this is our marriage certificate." There was further evidence presented tending to show that Belva and the deceased held themselves out to the public as husband and wife; that they had the reputation of being married; that they bought and sold property together; executed deeds of trust together; maintained joint bank accounts; filed joint tax returns; owned joint cemetery lots; and that Belva quit her job in order to stay home with the deceased and care for him in the last few months of his illness. Plaintiffs introduced birth certificates of the children allegedly fathered by the deceased. Each certificate lists plaintiff Belva as the mother and the deceased William Esley Howard as the father of the following children:

Nancy Irene Howard
David Wayne Howard
Carolyn Beatrice Howard
Billy Esley Howard
Linda Geraldine Howard
Bruce Johnson Howard

Defendants introduced into evidence two birth certificates of plaintiff Joseph B. Howard. The first certificate lists the child's name as Joseph Burt Anderson, the father as Napoleon Odell Anderson and Belva Elizabeth Bradley as the mother. The other certificate, which is a delayed certificate of birth, lists the child's name as Joseph Burton Howard, the father as William Esley Howard and the mother as Belva Elizabeth Bradley. In addition, defendants introduced two documents for the limited purpose of demonstrating the extent of their unsuccessful efforts to locate a copy of the purported marriage certificate of Belva and the deceased from the appropriate South Carolina officials.

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By defendant appellants' first, fifth, sixth, seventh and eighth assignments of error they present questions for review concerning the sufficiency of the evidence to take the case to the jury and to support the jury's finding that plaintiff Belva Elizabeth Bradley Howard is the lawful wife of William Esley Howard.

The defendants contend that the plaintiffs have produced no direct, nor any competent, evidence of a marriage between plaintiff Belva and the deceased. The law of North Carolina is well settled on this subject and is aptly stated by Robert E. Lee, who writes:

If two persons live together as husband and wife, holding themselves out to the public as such, and gain the reputation in the community as being married, there arises a rebuttable presumption of a valid marriage. [Par.] [Such a presumption may be established by proof of] general reputation that the parties were husband and wife.

1 Lee, North Carolina Family Law 4th, § 15, Presumption of Validity, at 55; See *Green v. Construction Co.*, 1 N.C. App. 300, 161 S.E. 2d 200 (1968); *Shankle v. Shankle*, 26 N.C. App. 565, 216 S.E. 2d 915, cert. denied, 288 N.C. 394, 218 S.E. 2d 467 (1975); and *Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967).

The Supreme Court in *Chalmers* held that a second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. 269 N.C. at 436, 152 S.E. 2d at 507. The court noted further that legality or illegality of the second or subsequent marriage is always one for the jury, even though the evidence may be uncontradicted. *Id.*

In *Green*, this court found there was sufficient competent evidence that plaintiff was married to the deceased because of independent testimony that the deceased had claimed plaintiff on his income tax form and that the deceased had told him that plaintiff and he were married by a minister. 1 N.C. App. at 303, 161 S.E. 2d at 202-203.

In this case there was evidence that Belva and the deceased held themselves out to the community as being married; that they told other persons they had become married; and that the deceased and Belva filed joint tax returns.

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Similarly, in *Shankle*, the proponent of the marriage offered circumstantial evidence of the intentions of the parties to become married; that the parties lived together and held themselves out as married to the public; that they had the reputation of being married; and that the wife was with the deceased husband during his last illness in the hospital. 26 N.C. App. at 567, 216 S.E. 2d at 917. The court held that circumstantial evidence is sufficient to prove a ceremonial marriage despite the lack of direct evidence. *Id.* at 568-569, 216 S.E. 2d at 918-919.

Such evidence has been presented in the case *sub judice*. Several independent witnesses testified as to Belva and the deceased's reputation in the community as husband and wife. There was additional competent evidence that Belva and the deceased bought and sold property, executed deeds of trust, had joint bank accounts, filed joint income tax returns and owned joint cemetery lots. In other words, they lived together as husband and wife in all respects.

Accordingly, there was sufficient evidence to support the trial court's submittal of the case to the jury and the jury's finding that there was a valid marriage between Belva and the deceased.

We have carefully examined the defendants' remaining assignments of error and find them to be without merit.

In the trial of this case we find no prejudicial error.

No error.

Chief Judge VAUGHN and Judge WEBB concur.

BARBARA KAYE PRESSLEY BLACK v. JOE NEAL BLACK

No. 8319DC1013

(Filed 3 July 1984)

Divorce and Alimony § 21.9—equitable distribution of marital property—dismissal of divorce action—equitable distribution claim not dismissed

Where plaintiff brought an action for divorce from bed and board on 1 August 1980, defendant filed a counterclaim in that action on 21 August 1980

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praying for divorce on the ground of adultery, plaintiff filed an action for divorce based on one year's separation on 4 November 1981 and asked for equitable distribution, the action in which defendant filed this counterclaim was tried on 6 May 1982 at which time plaintiff's claim was dismissed and defendant was granted a divorce, defendant moved for summary judgment in plaintiff's action for divorce which was granted, the trial court erred in dismissing plaintiff's claim for equitable distribution, though her claim for divorce was properly dismissed, since plaintiff's claim for divorce had been properly filed on 4 November 1981 pursuant to G.S. 50-19 and could not have been dismissed before the divorce decree was made; plaintiff's right to equitable distribution was a "species of ownership" in the marital property which was vested at the time she filed for divorce on 4 November 1981; and in light of the fact that G.S. 50-20 does not say whether this property right is divested by the dismissal of her action for divorce, the court holds that it is not.

Judge JOHNSON concurs in the result only.

APPEAL by plaintiff from *Warren, Judge*. Judgment entered 17 June 1983 in District Court, CABARRUS County. Heard in the Court of Appeals 7 June 1984.

The plaintiff appeals from a dismissal of her claim for equitable distribution. The parties were married and the plaintiff brought an action for divorce from bed and board on 1 August 1980. The defendant filed a counterclaim in that action on 21 August 1980 praying for a divorce on the ground of adultery. The plaintiff filed on 4 November 1981 this action for divorce on the ground the parties had been separated for one year. She asked for equitable distribution.

The action in which the defendant filed his counterclaim was tried on 6 May 1982 at which time the plaintiff's claim was dismissed and the defendant was granted a divorce. The defendant then made a motion for summary judgment in the plaintiff's action for divorce which was granted on 17 June 1983. The plaintiff's claim for divorce and equitable distribution was dismissed. The plaintiff appealed.

Koontz and Hawkins, by Timothy M. Hawkins, for plaintiff appellant.

Grant and Hastings, by Randell F. Hastings, for defendant appellee.

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WEBB, Judge.

G.S. 50-20 provides for equitable distribution. Subsection (k) of that statute provides:

"The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action."

Chapter 815, section 7 at 1186, of the 1981 Session Laws provides:

"This act shall become effective October 1, 1981, and shall apply only when the action for an absolute divorce is filed on or after that date."

G.S. 50-19 provides that an action for divorce under the provisions of G.S. 50-5 or G.S. 50-6 may be prosecuted during the pendency of a divorce action pursuant to these two sections.

Under the provisions of Chapter 815 of the 1981 Session Laws, equitable distribution has no application to the action in which the defendant counterclaimed for divorce. This action and the counterclaim were filed before 1 October 1981. The plaintiff could, pursuant to G.S. 50-19, bring an action for divorce under G.S. 50-6 on the ground that the parties had been separated for one year while the defendant's action for divorce under G.S. 50-5 on the ground of adultery was pending. When the plaintiff filed her action for divorce, her right to equitable distribution of marital property vested pursuant to G.S. 50-20(k) which declares this right to be a "species of common ownership."

The question posed by this appeal is whether the dismissal of the plaintiff's claim for divorce requires the dismissal of her claim for equitable distribution. We hold that it does not. Although the plaintiff's action for divorce was properly dismissed after a divorce had been granted in another action, it was properly filed under G.S. 50-19 and could not have been dismissed before the divorce decree was made. G.S. 50-20(k) provides that plaintiff's right to equitable distribution is a "species of ownership" in the marital property which was vested at the time she filed her action for divorce on 4 November 1981. The statute does not say whether this property right is divested by the dismissal of her ac-

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tion for divorce. In the absence of an express direction in the statute, we do not believe we should hold it is divested.

We can find no cases in this or other jurisdictions on the precise question presented by this appeal. *See Myers v. Myers*, 62 N.C. App. 291, 302 S.E. 2d 476 (1983) for a case which holds an action for divorce need not be stayed by the filing of an action for divorce and equitable distribution in another county.

We reverse the order of the district court and remand for further proceedings.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge JOHNSON concurs in the result only.

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DAVIDSON AND JONES, INC. v. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION AND THE UNIVERSITY OF NORTH CAROLINA

No. 8310SC693

(Filed 17 July 1984)

1. State § 4— contract action—waiver of immunity limited

The State's waiver of sovereign immunity in a breach of contract action is valid only to the extent expressly stated in G.S. 143-135.3, and the statute expressly limits a contractor to a claim for such amount as he deems himself entitled to *under the terms of the contract*.

2. State § 4— construction contract—overrun on excavation—recovery limited to terms of contract

Under the terms of the parties' contract for construction of new library stacks, plaintiff builder could recover neither general conditions costs nor home office overhead costs incurred because of unanticipated substantial rock excavation, particularly in light of the fact that plaintiff had notice early in the excavation of a massive overrun, but at no time during the year when most of the excavation took place did it contend under the terms of the contract that it was entitled to money damages different from the unit price stated in the contract; rather, if plaintiff felt it was being required to perform extra work by the engineer or architect outside the contract, plaintiff had the duty to give written notice and not proceed with the work affected until further notice.

3. State § 4— construction contract—excavation—no mutual mistake or misrepresentation

Where plaintiff agreed to construct new library stacks and the parties' contract provided for excavation of 800 cubic yards of rock, plaintiff could not argue mutual mistake and material misrepresentation in the quantity of rock to be excavated and claim additional general costs and home office overhead costs, though 3,714 cubic yards were actually removed, since the contract plainly stated that no allowance should be made for overhead and profit; the contract also stated that unit prices were net and no profit or overhead should be added or deducted when applying unit prices; both parties were aware of the existence of some rock, were aware that there could be an overrun or underrun from 800 cubic yards, and consciously considered this factor when fixing the unit price at \$55 per cubic yard; and there was thus no mistake or material misrepresentation.

4. State § 4— action on contract—award of financing costs improper

Where the trial court found that late payment by defendant for rock excavation resulted in plaintiff's incurring a certain amount in financing costs, the trial court erred in awarding that amount to plaintiff, since the parties' contract by its terms did not provide for "financing costs."

5. Interest § 1; State § 4— contract with State—award of interest improper

In an action to recover for overrun on rock excavation pursuant to the parties' contract for construction of new library stacks, the trial court erred in

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awarding plaintiff interest, since the State was not required to pay interest on its obligation unless authorized by contract or statute, neither of which was the case here.

6. Judgments § 5.1— final judgment—element missing

The trial court's "final judgment" lacked an essential formal ingredient to be a judgment where it did not state, "Now, therefore, it is ordered, adjudged and decreed that, etc."

APPEAL by defendants and cross-appeal by plaintiff from *Godwin, Judge*. Judgment entered 15 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 2 May 1984.

Attorney General Edmisten by Assistant Attorney General Grayson G. Kelley for defendant appellants.

Griffin, Cochrane & Marshall by Luther P. Cochrane and Jennifer L. Wheatley; and Manning, Fulton & Skinner by Charles L. Fulton for appellee-cross-appellant.

BRASWELL, Judge.

The parties executed a written building contract in 1975 for the construction by plaintiff of new stacks for books for the Wilson Library on the campus of the University of North Carolina at Chapel Hill. The contract contained a "rock clause," the interpretation and consequences of which form the core of this case.

After completion of construction and after exhaustion of the required statutory administrative procedures, the plaintiff brought this action in Superior Court alleging a breach of contract by defendants, whom we refer to as the State. In a non-jury hearing the trial court awarded damages to the plaintiff on the theory of breach of implied warranty for duration and delay-related expenses called "General Condition costs," additional unit price rock removal cost, late payment money, and interest on all items from 31 March 1976. The defendants appeal. The trial court denied any relief to plaintiff for additional compensation for home office overhead, and the plaintiff cross-appealed.

The ultimate facts essential to an understanding of the case follow:

The contract was executed on 9 June 1975 for a project amount of \$2,355,300.00. Plaintiff was given notice to proceed on

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14 July 1975. The contract terms required the work to be completed in 540 calendar days after the notice to proceed. The invitation to bid allowed 730 days for completion.

Extensions of time totaling 240 days were given to the plaintiff which changed the completion date from 5 January 1977 to 2 September 1977. No liquidated damages were requested or assessed by the State.

Rock excavation was a part of the general requirements of the contract. Section 0230 of the contract reads as follows:

0230 ROCK EXCAVATION: (Applicable to various prime contracts)

Material to be excavated is assumed to be earth and materials that can be removed with hand tools. *If rock is encountered within the limits of excavation, adjustments will be made in Contract on basis of unit price stated in Form of Proposal for all rock removed above or below these quantities:*

1. The General Contractor shall include 800 cubic yards of rock excavation in his base bid.

* * * *

Rock Excavation shall be defined as boulders of $\frac{1}{2}$ cubic yard or larger composed of hard granite or similar material requiring the use of rock drills and explosives for removal. (Emphasis added.)

The contract also states that "[u]nit prices are net and no profit or overhead shall be added or deducted when applying unit prices." (Emphasis added.)

The approved schedule of construction work showed rock excavation to be a critical activity for the plaintiff. On 28 July 1975, after obtaining permission, the plaintiff began the rock excavation. Plaintiff's schedule called for the excavation to be completed by 10 October 1975. By 30 September 1975 no less than 800 cubic yards of rock had been excavated. The excavation of all the rock was not completed until 30 April 1976. Time extensions of 146 days were granted to plaintiff for the overrun in rock excavation beyond the 800 cubic yards in the contract.

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In its bid proposal and in the contract, the plaintiff quoted a unit price for rock excavation of \$55.00 per cubic yard. The plaintiff subcontracted all rock excavation to T. H. Blake Contracting, Incorporated, through Thomas A. Blake, its major stockholder and president for "[t]he unit price [of] \$50 per cubic yard." Mr. Blake testified:

I was to be paid on a per cubic yard basis for the amount of rock I moved and I have come up with a cost figure which I could live with and do it. I based my bid on how many yards I had to move. The type of rock mattered to me but I was to be paid for the amount of rock per yard that had to be excavated to get the project complete. Under my contract, I wanted to be paid whether I took out a thousand or three thousand yards of rock. When I submitted my bid to Davidson and Jones, I included my profit in the unit price. My profit margin was somewhere around 15 percent.

The court found as a fact that the plaintiff's "unit price of \$55.00 per cubic yard was arrived at by taking the rock excavation subcontractor's cost per cubic yard (\$50.00) and adding an administrative markup of ten percent (\$5.00)."

The trial court found that the plaintiff, through its subcontractor Blake, actually removed 3,714 cubic yards of rock. This amount constituted more than a 400% overrun in rock quantity above the 800 cubic yards in the contract. In addition, the court stated that "[t]he magnitude of the overrun in rock excavation was not anticipated by the parties, nor was the overrun in Project time necessary to complete the work" anticipated.

Under Change Orders G-2 and G-4, which now form a part of the contract, the parties have stipulated that "the State paid for 3,300 cubic yards of rock removed at \$55.00 per cubic yard." Change Order G-4, as approved on 25 March 1976, grew out of the plaintiff's request on 19 March 1976 for the payment of additional rock excavation and several other construction items in the amount of \$136,780.00. The last paragraph of Change Order G-4 reads:

Net amount to be paid to Davidson & Jones, Inc. for any and all rock excavation on this project to date plus payment for

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adjustment of all other construction caused thereby: \$111,985.00.

On 7 May 1976 the plaintiff claimed additional compensation was due it for 50.5 cubic yards of rock required by the OSHA inspector to be excavated. This claim for \$2,777.00 was rejected by the State.

After completion of the project plaintiff filed claims for equitable adjustment, requesting "\$262,551.00 for the extra costs, duration expenses, inefficiency and interest costs" allegedly incurred because of the overrun in rock excavation. The parties have stipulated that "[e]xcept for such compensation as Davidson & Jones' claims is due under its Claims, Davidson & Jones has been paid the sums due it under the contract."

The trial court concluded that the plaintiff had not been paid for 414 cubic yards of rock removed [3,714 cubic yards total minus 3,300 cubic yards paid for, leaving a balance of 414 cubic yards]. At \$55 per cubic yard under the unit price of the contract the total sum allegedly due is \$22,770.00. This sum constituted a part of the damages awarded to the plaintiff by the trial judge.

Our inquiry now focuses on how the figure of 800 cubic yards of rock became a clause in the contract. As pointed out in the State's brief, and as contained in Plaintiff's Exhibit No. 10, a rock clause is a part of State policy in regard to building construction:

Rock clauses shall be included in every contract where rock is anticipated. Wherever reasonable, an estimated quantity of rock shall be included in the base bid, with a unit price to be quoted for adjustments above and below the stated quantity.

Property Control and Construction Manual, *Planning Procedures Related to Design and Construction of Capital Improvement Projects of the State of North Carolina*, Chap. XXXV, Sec. VI(d) (4th Ed. 1972).

It was in response to this requirement that the architect inserted section 0230 (quoted earlier in this opinion) as a part of the Supplementary General Conditions of the Contract. The specific figure of 800 cubic yards was an estimate by the architect based upon the 26 April 1974 written report of test borings prepared by Soil & Material Engineers, Inc. from a subsurface investigation of

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the project site. This report was a public document and available for inspection by any contractor prior to bid submission.

The trial judge found as a fact that:

[T]he information depicted on Contract drawing S-13 contains an inaccurate representation of the top of the rock to be encountered on the Project. As is confirmed by minutes (Plaintiff's Ex. 53) of a private meeting between the Project Architect and representatives of the Owner which occurred on March 2, 1976, an error had been made in calculating the 800 cubic yard estimated quantity set forth in Specification Section 0230. In addition to the computational error, the Project Architect had also discovered that the top of rock information depicted in the Subsurface Report and on Sheet S-13 was incorrect by approximately two and one-half feet in that the top of rock actually encountered by Davidson & Jones on the Project was some two and one-half feet (on the average) *above* the top of rock depicted in the Subsurface Report and on Contract drawing S-13.

Although there was some rock outcropping on the site, the court found that when plaintiff and its subcontractor investigated the job site that "there existed no reasonable observable physical facts within the Project limits which would have indicated to them that the State's estimate of approximately 800 cubic yards of rock was substantially in error or that any condition existed which required further site investigation."

The trial court concluded as a matter of law: (1) "that both Davidson & Jones and the State were unaware of the actual quantity of rock which would have to be excavated . . . and were thus mutually mistaken as to a material fact"; (2) "[t]hat there has been a breach of the implied warranty of the adequacy and accuracy of the plans and specifications"; and (3) that the more than 400% overrun in estimated rock quantity "constitutes a material change in the scope of the Project work for which additional compensation is due Davidson & Jones under the Contract."

As for the "unanticipated duration related expenses," the court concluded at least 26 weeks were involved, that the plaintiff kept business records of the costs incurred, and that the plaintiff was entitled to additional compensation in the amount of \$110,-

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710.00 for "General Conditions costs (the cost of Davidson & Jones, job site establishment, supervision, utilities, equipment, and similar time-related expenses)." The total award of damages was concluded by the trial court to be "a direct and proximate result of Davidson & Jones encountering the unanticipated variation of a material bid item" for which the plaintiff was "entitled to recover from the State as an equitable adjustment under the Contract." The source of the equitable adjustment was also said to be "pursuant to the Contract, Articles 15 and 16."

We now turn to the assignments of error brought forward in the brief by the State in its questions presented. We choose to discuss question number 3 concerning the denial of the State's motion for a dismissal or directed verdict at the close of the plaintiff's evidence, as the key to our decision. While the State also assigns as error the denial of its motion for partial summary judgment, no separate treatment of this is required by virtue of the subsequent motion for a directed verdict. Within the discussion on directed verdict we will also treat the related question number 5 as to whether, in law, the plaintiff was entitled to an equitable adjustment in compensation. The State's remaining questions relate solely to the admission or exclusion of evidence. We also note that the thrust of the plaintiff's cross-appeal raises the issue of whether the court erred in denying plaintiff's request for additional compensation for home office overhead.

To bring these issues into focus, we pose the question also suggested in plaintiff's brief under its discussion of the motion for directed verdict: Does the Contract authorize a recovery such as Davidson & Jones was awarded by the trial court? And, does the Contract authorize additional compensation for home office overhead?

Since this was a nonjury case, our scope of review is controlled by G.S. 1A-1, Rule 41(b) instead of Rule 50(a) [the defendants referred to both Rules in their motion to the trial court]. Rule 41(b) has been fully analyzed by our Supreme Court in *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E. 2d 209, 218 (1983). This motion to dismiss "challenges the sufficiency of plaintiff's evidence [and law, per Rule 41(b)] to establish plaintiff's right to relief." *Id.*

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It is the State's position that while a contractor may bring an action against the State for contract damages, the action must be based upon a specific contractual provision which the State has allegedly violated. Because the contract contains no provision for an "equitable adjustment" or for the recovery of any type of delay damages, the State contends the plaintiff cannot recover any additional money.

[1, 2] The North Carolina General Assembly has determined the circumstances under which the State may be sued for breach of contract by its enactment of G.S. 143-135.3. It is captioned "Procedure for settling controversies arising from contracts; civil actions on disallowed claims." Among its provisions we find these words:

Upon completion of any contract for construction . . . work . . . should the contractor fail to receive such settlement as he claims to be entitled to *under the terms of his contract*, he may . . . submit . . . a written and verified claim for such amount as he deems himself entitled to *under the terms of said contract*, setting forth the facts upon which said claim is based. . . .

As to such portion of a claim which may be denied . . . the contractor may . . . institute a civil action for such sum as he claims to be entitled to *under said contract* by the filing of a verified complaint and issuance of summons. . . . [Emphasis added.]

When our Supreme Court resolved the case of *Middlesex Construction Corp. v. State ex rel. Art Museum Bldg. Comm.*, 307 N.C. 569, 574, 299 S.E. 2d 640, 643 (1983), *rehearing denied*, 310 N.C. 150, 312 S.E. 2d 648 (1984), it discussed the case of *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), *reversed on other grounds*, 298 N.C. 115, 257 S.E. 2d 399 (1979), and said: "We read nothing in *Smith* which would indicate an intention to modify, ameliorate or abrogate the legislative mandate of G.S. 143-135.3." Accordingly, we hold that the State's waiver of sovereign immunity in a breach of contract action is valid only to the extent expressly stated in the statute, and that the plaintiff's remedy here must be found exclusively within the express terms of the statute. The statute is clear in limitation of recovery except as otherwise provided "*under terms of his contract.*" [Emphasis added.]

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We hold that "under terms of his contract" neither general conditions costs nor home office overhead costs can be recovered under the contract. Specifically under Article 16, if the plaintiff had felt that it was being required to perform extra work by the engineer or architect outside of the contract, the plaintiff had a duty to "give written notice therefor to the Engineer or Architect without delay, and . . . not proceed with the work affected until further advised." Even then Article 16 requires a written change order supporting the change. Only after all rock excavation had been substantially completed did the plaintiff seek to apply Articles 15 and 16 of the contract so as to acquire financial relief.

One pertinent change order, known as G-4, requires specific examination. It resulted in a payment by the State to plaintiff of \$111,985.00, and was a mutually agreed upon amendment to the contract. Change Order G-2 had preceded G-4 on 27 February 1976 which granted plaintiff a partial payment of \$50,000.00. G-4 came as a result of plaintiff's request on 19 March 1976 for compensation for "final rock excavation quantities" of 3,663.5 cubic yards, and for quantities not previously paid at \$55.00 per cubic yard. This March request did not contain any demand or claim for additional compensation for "general condition" costs, "time delay" costs, or "home office overhead" costs. The controlling words of the final paragraph of G-4 provide that the State will pay the net amount for any and all rock excavation to date plus payment for adjustments caused in all other construction. It further relates the sum of \$111,985.00 as this net amount. The plain language of G-4 does not show a contract requiring the State to pay overhead, general conditions costs, or time delay costs, or profit, in contravention of the "terms of his contract."

As noted earlier, actual excavation of rock began on 28 July 1975. As of 8 October 1975 the architect's records indicate the subcontractor had excavated 1,100 cubic yards of rock. As of 12 November 1975 a total of 1,508 cubic yards had been excavated. On 30 January 1976 plaintiff informed the architect that the subcontractor had removed 2,930 cubic yards of rock. Thus, early in the excavation the plaintiff had actual knowledge of a massive overrun of rock. The record fails to show that at any time up to 10 October 1975 (the date the plaintiff had set as his critical date to complete the rock excavation), or at any time during the year 1975, did the plaintiff contend under the terms of his contract

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that he was entitled to money damages different from the unit price of \$55.00 per cubic yard. The plaintiff is bound by its contract.

[3] As another ground for relief the plaintiff vigorously argues mutual mistake and material misrepresentation in the quantity of rock to be excavated. It is a fact beyond question that 3,714 cubic yards is materially and substantially different from 800 cubic yards of rock. The encounter of the greater quantity of rock did cause time delay in the completion of construction and did result in additional general costs and in some additional amount of home office costs. But the contract is plain, stating in Article 15(a) that: "[N]o allowance shall be made for overhead and profit." Also, the contract states that "[u]nit prices are net and no profit or overhead shall be added or deducted when applying unit prices." It was anticipated by both parties that some rock would be encountered and both hedged against the assumed risk in the unit price of \$55.00, which also gave the plaintiff a \$5.00 per cubic yard margin over its subcontract.

To understand the figure 800 cubic yards of rock removal with regard to construction and building contractors' work and to comprehend that this figure is not a "mutual mistake," "misrepresentation," or a "breach of implied warranty," we consider and examine the term "mistake" in relation to an aleatory promise or one that is "of or depending on chance, luck, or contingency." Webster's New World Dictionary (2d College Ed. 1980). Black's Law Dictionary (Rev. 4th Ed. 1951) defines an aleatory contract as "[a] mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all of the parties or to some of them, depend on an uncertain event." With these definitions in mind Corbin, a recognized authority on Contracts, says:

When a contractual promise is aleatory in character, the performance being made expressly conditioned upon an uncertain and hazardous event, the promisee bets that it will happen and the promisor bets that it will not. The consideration exchanged for such a promise varies in proportion to their opinion as to probability. They consciously assume the risk. If the event occurs, or occurs sooner than the promisor expects, he is the loser; if it fails to occur or occurs later than the promisee expects, it is he who is the loser. The opinion of

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one of them as to probability is thus shown to have been erroneous; but his mistake is not ground for rescission because he consciously assumed the risk. 3 *Corbin on Contracts* Sec. 598 (1960).

Both plaintiff and the defendants were aware of the existence of some rock and were aware that there could be an overrun or underrun from 800 cubic yards. They consciously considered this factor when fixing the unit price at \$55.00 per cubic yard. As Corbin indicates further in such a situation:

There is no mistake; instead, there is awareness of the uncertainty, a conscious ignorance of the future. . . . They were aware of the uncertainty, estimated their chances, and fixed the compensation according. *Id.* at p. 586.

A "mistake" according to Restatement, Contracts Sec. 500, [cited in 3 *Corbin on Contracts* at p. 579, fn. 1] "means a state of mind that is not in accord with the facts." Neither party knew of the error in the quantity of rock at the time the contract was entered into. The risk of such error having been assumed by both parties by the conscious inclusion of a unit price for overruns cannot be shifted by a resort to custom or oral change because the parties agreed to the allocation of this risk in writing. As Corbin puts it, "[t]he risk of unexpected cost and difficulty in the performance of construction contracts is usually carried by the building contractor." *Corbin, supra*, at p. 590. In the final analysis Corbin concludes that "[w]e can only say that the parties can control the matter by agreement; but interpretation may be difficult." *Id.* at p. 591. Contracts are "'devices to allocate the risks of life's uncertainties,'" and "'[w]here parties allocate the risk of loss . . . the commentators and the opinions are agreed there is little room for judicial relief from resulting losses.'" *Id.* at p. 703 (Supp. 1984), quoting *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

[4] We now examine a related facet of the "judgment." In Conclusion of Law No. 35(c) the trial court reasoned that the plaintiff was entitled to recover "\$2,369.00 for late payments by the State during construction for rock removal." This conclusion is based upon Finding of Fact No. 56 which says: "Davidson & Jones' records also indicated that late payment by the Owner for rock excavation resulting in Davidson & Jones incurring \$2,369.00 in

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financing costs." While the State did except to all of Conclusion of Law No. 35, and assign as error that the same was not supported by sufficient evidence nor proper findings of fact, we note that the State failed to except to Finding of Fact No. 56. Our court has held in *In re Smith*, 56 N.C. App. 142, 149, 287 S.E. 2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982), that "[b]y failing to except to the findings of fact, they are deemed to be supported by competent evidence and are conclusive on appeal." However, the remainder of the interpretation of the rules, as stated by our court in *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E. 2d 787, 790 (1975), holds that "the conclusions of law made by the judge upon the facts found are reviewable on appeal."

We interpret Finding of Fact No. 56 to mean that plaintiff incurred \$2,369.00 in financing costs during the period of construction. We hold that because the contract by its terms does not provide for "financing costs" that the plaintiff cannot recover any financing costs. We reverse the award of \$2,369.00 to the plaintiff.

[5] We next examine the subject of the recovery of interest against the State. By its Conclusion of Law No. 37 the trial court ruled:

That Davidson & Jones is entitled to recover interest on the amounts set forth in the above Conclusions of Law at the rate of five percent (5%) per annum from March 31, 1976.

This was error, and the award of any interest is reversed.

"A long-standing rule in this State" as we held in *Stanley v. Retirement and Health Benefits Division*, 66 N.C. App. 122, 123, 310 S.E. 2d 637, 638 (1984), establishes that "the State is not required to pay interest on its obligations unless authorized by contract or statute," citing in support the cases of *Cannon v. Maxwell, Comr. of Revenue*, 205 N.C. 420, 171 S.E. 624 (1933), and *Teer Co. v. Highway Comm.*, 4 N.C. App. 126, 166 S.E. 2d 705 (1969). In *Stanley*, the plaintiff recovered the principal amount of death benefits, but no interest was allowed against the State. In *Cannon*, no interest was allowed on taxes refunded after being paid under protest. It was Chief Justice Ruffin of our Supreme Court who made plain the law of interest in North Carolina in 1843 when he wrote that "the State never pays interest unless

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she expressly engages to do so." *Attorney General v. Navigation Co.*, 37 N.C. 444, 454 (1843). Also see, *United States v. North Carolina*, 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336 (1890).

Our attention has not been called to any statute authorizing the recovery of any interest against the State on breach of contract on the facts of this case, and we are unaware of any. G.S. 143-134.1, entitled "Interest on final payments due to prime contractors," has been examined by this Court, but found not to be applicable on the face of its textual language.

The only remaining source of authority for the payment of interest would be the contract itself. We are at a loss to know the source of the trial court's figure of "5%" for the purported award of interest. We have examined the record on appeal and exhibits, but find no mention of "5%" interest within the contract. We would also point out the following stipulation in the record on appeal.

No documents or pleadings which are not set forth in this record are necessary for understanding the exceptions relied on

We assume the date "March 31, 1976," the alleged date from which interest was to begin, was considered by the trial court to be the date of breach. However, under the law of North Carolina there can be no prejudgment recovery of interest against the State in the absence of statute or contract provision. Likewise, there can be no postjudgment recovery of interest against the State. The legal rate of interest as established by G.S. 24-1 is not applicable here. Neither does G.S. 24-5 apply, which speaks to the recovery of interest from judgment on contract cases, because here the State is the party against whom judgment has been recovered. While interest was approved under G.S. 24-5 when the State was a party in *Edmisten, Attorney General v. Chemical Co.*, 45 N.C. App. 604, 263 S.E. 2d 849 (1980), we would point out that it was the defendant Zim Chemical Company, Inc., who was ordered to pay interest from judgment, and not the State. We also point out that as recent as *Myers v. Department of Crime Control and Public Safety*, --- N.C. App. ---, 313 S.E. 2d 276 (1984), another panel of this Court concluded that postjudgment interest could not be awarded or collected against the State under the

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State Torts Claims Act because of the lack of any statutory enactment upon which to assess interest.

[6] We now turn to that document in the record which all parties have treated as a "final judgment," but which lacks an essential formal ingredient to be a judgment. At no point in the document called "Findings of Fact and Conclusions of Law," filed 19 July 1982, from which appeals were taken, did the judge make a decree or judgment. In other words the document lacks the customary final portion of a judgment that usually begins: Now, therefore, it is ordered, adjudged and decreed that, etc. [We note that under today's rules of procedure any one of the three synonyms would be sufficient.]

As it stands, the defendants have not been "ordered" to do anything. The document also fails to tax the costs below. The court in its Conclusions of Law No. 36, however, did state that it denied relief to the plaintiff for additional compensation for home office overhead. Similarly, it could be argued that Conclusion of Law No. 35 constituted a formal award of money damages to the plaintiff. *See Annot.*, 73 A.L.R. 2d 250, 291 (1960).

The results are:

A. As to the State's appeal:

We affirm the trial court's award to the plaintiff of \$22,770.00 for the 414 additional cubic yards of rock removed as being according to the terms of the contract.

We reverse the award of \$2,369.00 for financing costs as not being within the terms of the contract.

We reverse the award of \$110,710.00 as General Conditions costs as not being within the terms of the contract.

B. As to the Plaintiff's appeal:

We affirm the trial court's denial of any compensation to the plaintiff for home office overhead as not being within the terms of the contract.

C. We remand for entry of a proper judgment in accordance with this opinion.

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Affirmed in part; reversed in part; and remanded for judgment.

Chief Judge VAUGHN and Judge EAGLES concur.

HARRELSON RUBBER COMPANY v. BOBBY LEE LAYNE, SR. D/B/A BOBBY LAYNE TIRE AND RECAPPING

No. 8319SC1001

(Filed 17 July 1984)

1. Process § 9— nonresident defendant—in personam jurisdiction—statutory authority

G.S. 1-75.4(5) conferred authority on the courts of N. C. to exercise personal jurisdiction over nonresident defendant, where the evidence tended to show that the parties had a franchise agreement whereby defendant, a Virginia citizen who conducted his business there, was given the right to use a patented retreading process which plaintiff, a Delaware corporation with its principal place of business in Asheboro, developed; plaintiff prepared and mailed its "Process Operating Manual" to defendant from N. C.; plaintiff manufactured precured tread rubber and cement for defendant in N. C.; all services provided for in the parties' franchise agreement were performed or to be performed by plaintiff from either of its N. C. plants or its offices in Asheboro; the materials and retreading equipment purchased by defendant from plaintiff were all shipped from N. C.; and a promissory note signed by defendant was to be paid to plaintiff at its Asheboro offices in thirty-six monthly installments.

2. Constitutional Law § 24.7; Process § 9.1— nonresident defendant—minimum contacts—personal jurisdiction—no violation of due process

Defendant nonresident had sufficient minimum contacts with this State and the nature and quality of his contacts were such that exercise of personal jurisdiction over him did not violate his right to due process where plaintiff resident and defendant had an ongoing vendor-vendee relationship authorized by their franchise agreement; defendant made purchases from plaintiff on several occasions; defendant agreed to make payments on its promissory note at plaintiff's N. C. offices; and plaintiff's performance under the agreement occurred largely in this State.

APPEAL by plaintiff from *Beaty, Judge*. Order entered 3 August 1983 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 7 June 1984.

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Beck, O'Briant and O'Briant, by Adam W. Beck, for plaintiff appellant.

Moser, Ogburn, Heafner & Miller, by D. Wescott Moser and Michael C. Miller, for defendant appellee.

WHICHARD, Judge.

I.

The issue is whether the court properly dismissed plaintiff's action for lack of personal jurisdiction over the nonresident defendant. We hold that G.S. 1-75.4(5) confers on our courts authority to exercise personal jurisdiction over defendant; that defendant's activities meet the minimum contacts test; and that exercise of jurisdiction thus does not offend due process.

II.

Plaintiff is a Delaware corporation with its principal office and place of business in Asheboro, North Carolina. Defendant, a sole proprietor in a tire and recapping business, is a citizen and resident of Campbell County, Virginia, and conducts his business there.

This action arises from a franchise agreement which the parties executed on or about 1 May 1979. Plaintiff was the franchisor, and defendant the franchisee, under the agreement. The subject of the agreement, *inter alia*, was the right to utilize a patented retreading process which plaintiff developed.

Plaintiff sued defendant for breach of the franchise agreement, a \$33,623.22 balance due on a promissory note, \$13,683.42 plus interest due on an open account, royalty fees of twenty cents per pound of precured tread rubber and cement supplied by plaintiff and used by defendant in retreading tires. Defendant, who was duly served with summons, moved under G.S. 1A-1, Rule 12(b)(2) to dismiss for lack of jurisdiction over his person. Plaintiff appeals from an order granting this motion.

III.

The test for establishing jurisdiction over nonresident individuals is two-pronged. The first step is to determine whether the "long-arm" statute, G.S. 1-75.4, confers jurisdiction. *Buying*

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Group, Inc. v. Coleman, 296 N.C. 510, 513, 251 S.E. 2d 610, 613 (1979). With respect to contracts, this statute confers authority on our courts to exercise jurisdiction in any action which:

- a. [a]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
- b. [a]rises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
- c. [a]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
- d. [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction.

G.S. 1-75.4(5).

[1] The franchise agreement, together with the promissory note, constituted a promise by defendant to pay for services actually performed prior to breach and to be performed in the future. G.S. 1-75.4(5)a, b. The services to be performed are illustrated by plaintiff's obligation under the agreement, *inter alia*, continually to improve its patented retreading process at its Asheboro plant, and to make such improvements available to defendant. Services actually performed in this state by plaintiff for defendant were the preparation and mailing of plaintiff's SUPERTREAD "Process Operating Manual," and the manufacture of precured tread rubber and cement as authorized under the franchise agreement. Defendant's own affidavit acknowledged that plaintiff had forwarded to him its "Process Operating Manual." An affidavit by plaintiff's president averred that all services provided for in the franchise agreement "*were performed or to be performed by [plaintiff]*" from either of its North Carolina plants or its offices in

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Asheboro, North Carolina." (Emphasis supplied.) An affidavit by a third party, who was familiar with this action and the negotiations between plaintiff and defendant, averred that "[t]he materials and retreading equipment purchased by the defendant from the plaintiff *were all shipped* from North Carolina." (Emphasis supplied.)

The \$38,316.24 promissory note signed by defendant was to be paid to plaintiff at its Asheboro offices in thirty-six monthly installments of \$1,064.34. A promise in a note to make payments to a plaintiff in the forum state is a promise to deliver there a thing of value within the meaning of G.S. 1-75.4(5)c. *Wohlfahrt v. Schneider*, 66 N.C. App. 691, 693, 311 S.E. 2d 686, 687 (1984). Plaintiff's mailing of the "Process Operating Manual" and shipping of the precured tread rubber and cement, all pursuant to the franchise agreement, constituted the shipping of goods from North Carolina by plaintiff to defendant on defendant's order or direction. G.S. 1-75.4(5)d.

We thus hold that G.S. 1-75.4(5) conferred authority on our courts to exercise personal jurisdiction over defendant.

IV.

The second step in the two-pronged test is to determine whether exercise of this statutory power offends the "minimum contacts" requirement of due process. *Buying Group, Inc., supra*.

The 'litmus standard' . . . is well-known and was established . . . by the landmark case of *International Shoe Co. v. Washington* [citation omitted]: Due process requires that a non-resident defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Phoenix America Corp. v. Brissey, 46 N.C. App. 527, 530, 265 S.E. 2d 476, 479 (1980). This Court stated in *Phoenix*:

Helpful criteria for analyzing whether minimum contacts are present include: '[T]hree primary factors, namely, the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with

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those contacts, . . . and . . . two others, interest of the forum state and convenience.'

Id. at 530-31, 265 S.E. 2d at 479 (quoting *Aftanase v. Economy Baler Co.*, 343 F. 2d 187, 197 (8th Cir. 1965)). Using these factors as a guide, we examine the facts here, in light of existing case law, to determine whether defendant had sufficient minimum contacts with the forum state.

A. *Quantity of Contacts*

[2] The trial court found that defendant had made "purchases of retread rubber on several occasions from plaintiff's plants in North Carolina." This finding was not challenged by exception in the record. It thus is presumed to be correct and supported by competent evidence, and it is binding on appeal. *Tinkham v. Hall*, 47 N.C. App. 651, 652-53, 267 S.E. 2d 588, 590 (1980).

Further, affidavits in the record support the finding. Defendant's affidavit admits that plaintiff supplied him with precured tread rubber and cement. This corroborates plaintiff's president's affidavit, which avers that upon request and authorization of defendant plaintiff manufactured and shipped precured tread rubber and cement for defendant's use in the Harrelson SUPERTREAD Process. These affidavits also show that plaintiff prepared and mailed the "Process Operating Manual" to defendant from plaintiff's Asheboro plant. The third party's affidavit, referred to above, states that "materials and retreading equipment [were] purchased by the defendant from the plaintiff [and] were all shipped from North Carolina."

This evidence reveals a substantial quantity of contacts by defendant with the forum state, in that plaintiff furnished precured tread rubber to defendant on "several occasions" from plaintiff's plants in North Carolina. Plaintiff also furnished equipment and a "Process Operating Manual" to defendant, and these too were furnished from plaintiff's plants in North Carolina.

Defendant cites *Phoenix*, *supra*, as a basis for finding lack of jurisdiction. In *Phoenix* the purchase at issue involved a single sale. Plaintiff and defendant had "had dealings" on only one prior occasion. The quantity of contacts thus at best was two, and only one of those related to the action. Further, "all the elements of

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the defendants' performance . . . [were] to take place outside the forum." *Phoenix, supra*, 46 N.C. App. at 532, 265 S.E. 2d at 480.

Here, by contrast, the parties had an ongoing vendor-vendee relationship authorized by the franchise agreement. Defendant made purchases from plaintiff on "several occasions." Plaintiff's performance under the agreement occurred largely in the forum state. We thus find *Phoenix* distinguishable and not controlling. We further find the requisite quantity of contacts adequately evidenced.

B. Nature and Quality of Contacts

Generally, "[a]pplication of the 'minimum contacts' rule 'will vary with the quality and nature of the defendant's activity.'" *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E. 2d 676, 679 (1974) (quoting *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958)). "The existence of minimum contacts, therefore, depends upon the particular facts of each case." *Chadbourn, Inc., supra*, 285 N.C. at 705, 208 S.E. 2d at 679; *see also Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952).

Here, defendant entered into a franchise agreement with plaintiff whereby defendant would receive rights to the patented trademark of Harrelson SUPERTREAD for selling recapped tires. The franchise agreement shows that the parties anticipated a long business relationship. The term of the agreement was for

the life of any United States Patent application disclosing and claiming the Harrelson SUPERTREAD Process and for the life of the last to expire of any United States Patent covering the SUPERTREAD Process, and thereafter for so long as Franchisee [defendant] uses the Harrelson SUPERTREAD and/or Harrelson Trademark(s) and service mark(s), unless terminated sooner as provided hereinafter.

Since patents generally have a lengthy life, *see* 69 C.J.S. *Patents* § 164 (1951), and the term of the agreement extended even beyond expiration of plaintiff's patents if defendant continued to use plaintiff's trademarks or service marks, the parties clearly contemplated continuing, systematic activity. In *Styleco, Inc. v. Stoutco, Inc.*, 62 N.C. App. 525, 302 S.E. 2d 888, *disc. rev. denied*, 309 N.C. 825, 310 S.E. 2d 358 (1983), this Court upheld personal

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jurisdiction over a foreign corporation on the ground, *inter alia*, that "this was not a single-item contract but the parties anticipated they would have a 'long, profitable relationship.'" *Id.* at 529, 302 S.E. 2d at 891.

Defendant relies on *Andrews Associates v. Sodibar Systems*, 28 N.C. App. 663, 222 S.E. 2d 922, *disc. rev. denied*, 289 N.C. 726, 224 S.E. 2d 676 (1976), in which the defendant's only contact with the forum state was that on two occasions it entered separate contracts, in Washington, D.C., with a North Carolina business association for delivery of certain goods by plaintiff from plaintiff's North Carolina warehouse. On the ground that there was "[n]o . . . continuing contractual relationship connecting defendant with the forum State," *id.* at 669, 222 S.E. 2d at 926, this Court reversed an order finding personal jurisdiction.

The facts here are different from those in *Andrews*. The franchise agreement here states:

WHEREAS, Franchisee [defendant] desires to retread tires for certain types of vehicles by the Harrelson SUPERTREAD Process and to market the tires it so retreads, using the commercial benefits of the Harrelson and SUPERTREAD names . . . Franchisor's technical knowhow, management and marketing expertise . . . commercial reputation of Franchisor . . . and [w]hereas, Franchisee desires the privilege of being a Vendee Franchisor with respect to certain materials and accessories and supplies marketed by the Franchisor

This and other language clearly evidences that the parties contemplated a continuing contractual business relationship, not one or two isolated transactions. The evidence also shows, and the court found without exception, shipments pursuant to the agreement "on several occasions," not just one or two.

The promissory note further evidences the nature and quality of defendant's contacts. Defendant therein promised:

[T]o pay to the order of [plaintiff] at its office in Asheboro, North Carolina, the principal sum of [\$38,316.24] with interest on principal after the maturity . . . in . . . 36 equal monthly installments of \$1,064.34 . . . on the 20th day of each month.

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(Emphasis supplied.) The note thus contemplates repetitive activity occurring in the forum state.

The facts in *Wohlfahrt, supra*, were similar to those here with respect to the promissory note. There plaintiffs sued a non-resident defendant for \$43,500, the balance allegedly due under the terms of a note executed incident to defendant's purchase of various articles of medical equipment from plaintiffs. Defendant appeared specially and moved to dismiss for lack of jurisdiction over his person. This Court held that exercise of jurisdiction over defendant would not offend due process. It stated:

[D]ue process depends upon whether it is fair and reasonable to require a non-resident defendant to litigate the particular case involved in the forum state. Requiring the defendant to litigate his obligation under the note here seems entirely fair to us. He is the one that promised to make the note payments here, and in doing so he must have anticipated that here is where he would be sued if the payments were not made.

Wohlfahrt, supra, 66 N.C. at 694, 311 S.E. 2d at 688.

In *Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973), this Court held that "[w]here the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over the defendant." *Id.* at 647, 197 S.E. 2d at 558 (citing *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970)). A promise by a defendant to pay his own debt to a North Carolina creditor at its North Carolina offices is a fact which should have some bearing, when considered together with the other facts in the case, in determining whether sufficient minimum contacts exist upon which to assert jurisdiction.

Defendant relies in part on *Buying Group, Inc., supra*. The facts there differ significantly, however, from those here. There our Supreme Court held that our courts had no jurisdiction over a nonresident who merely co-signed a note guaranteeing payment of his brother's indebtedness to plaintiff. It found that the nonresident brother held "no attending commercial benefits to

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himself enforceable in the courts of North Carolina." *Buying Group, Inc., supra*, 296 N.C. at 517, 251 S.E. 2d at 615. By contrast, defendant here was not an accommodation third party co-signer with "no attending commercial benefits to himself enforceable in the courts of North Carolina." He was, instead, a signatory to a franchise agreement which clearly contemplated continuing systematic business activity between himself and plaintiff. The activity on plaintiff's part was to occur largely within North Carolina. Such activity in fact occurred "on several occasions." Defendant promised to make its payments to plaintiff at its North Carolina offices. Defendant clearly could have enforced its "attending commercial benefits" under the agreement in the courts of North Carolina. The cases thus are readily distinguishable.

We find the nature and quality of defendant's contacts with this state sufficient that exercise of *in personam* jurisdiction over him by its courts does not offend traditional notions of fair play and substantial justice.

*C. Source and Connection of the Cause of Action
with Defendant's Contacts*

The causes of action asserted here—for breach of the franchise agreement to pay for services, balance due on open account for goods delivered, default on the note, and royalty fees per pound due on the precured tread rubber and cement furnished defendant by plaintiff—arise from the franchise agreement. By entering the agreement, defendant requested precured tread rubber and cement from plaintiff, which was to be delivered from plaintiff's North Carolina plants. Defendant also promised to pay the note to plaintiff at plaintiff's Asheboro office. Moreover, the franchise agreement entitles defendant franchisee to receive \$500 for

each modification and/or improvement disclosed by Franchisee to Assignor or Licensor of Franchisor hereunder, and on which Assignor or Licensor of Franchisor files an application for patent.

As noted, the agreement contemplated a continuing contractual relationship over an extended period of time, not one or two isolated transactions. Plaintiff in fact shipped goods to defendant,

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pursuant to defendant's request under the agreement, on "several occasions," not just one or two. Repetitive activity in the forum state thus was contemplated by the agreement and in fact occurred. There were "attending commercial benefits" to defendant under the agreement, which defendant could have enforced in the courts of the forum.

We thus find that the source of the causes asserted here is in defendant's contacts with the forum state, primarily the franchise agreement which established a continuing contractual relationship over an extended period of time with a corporate citizen of the forum state; and that the causes are substantially connected with defendant's contacts.

D. Interest of the Forum State

"Any state has a general interest in providing a forum for its residents to settle disputes in which they are involved." *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424, 428 (M.D.N.C. 1977).

North Carolina has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the state for that purpose.

Byham v. House Corp., 265 N.C. 50, 60, 143 S.E. 2d 225, 234 (1965).

As a result of the franchise agreement and promissory note, the nonresident defendant allegedly is indebted to plaintiff, a corporate citizen of this state which was to perform its obligations largely within this state, for approximately \$47,000 plus the amount due as royalty fees. The relationship between the parties under the franchise agreement, which was to be performed substantially within this state, together with defendant's obligation under the note, constituted the establishment of trade within this state. The fact that defendant never was physically present in this state should not control. As stated in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23, 2 L.Ed. 2d 223, 226, 78 S.Ct. 199, 201 (1957), "[t]oday many commercial transactions touch two or more States and may involve parties separated by the full continent." By entering the franchise agreement, defendant established a relationship with a corporate citizen of this state, which citizen was to perform and partially did perform largely

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within this state. This state thus has an interest in providing plaintiff, its corporate citizen, with access to its courts to enforce the agreement.

E. Convenience

Litigation on interstate business transactions inevitably involves inconvenience to one of the parties. The inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience to plaintiff of litigating in Virginia. Under all the circumstances of this case, we find no convenience factors which are determinative of the jurisdictional issue.

V.

The ultimate test for determining the existence of personal jurisdiction over a nonresident defendant is basic fairness. Because the franchise agreement established a continuing contractual relationship with a corporate citizen of this state which was to extend over a considerable period of time, the performance of which was to occur largely in this state, and which contains clear "attendant commercial benefits" to defendant, we perceive no unfairness inherent in requiring defendant to litigate in this state the causes asserted. Indeed, we believe it would be unfair to plaintiff if it could not litigate those causes here.

For the reasons and pursuant to the authorities set forth above, we thus hold that the courts of this state have statutory authority to assert personal jurisdiction over the nonresident defendant in this action; that it is fair and reasonable to require him to litigate the matter here; and that the exercise of the statutory authority to assert personal jurisdiction thus comports with the requirements of due process. Accordingly, the order of dismissal is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

Judges ARNOLD and EAGLES concur.

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LUTHER F. CHAPMAN v. MORRIS POLLOCK AND RALEIGH INTERNAL MEDICINE ASSOCIATION, P.A.

No. 8310SC54

(Filed 17 July 1984)

1. Physicians, Surgeons, and Allied Professions § 15.1— malpractice—expert testimony improperly excluded

The trial court in a medical malpractice case erred in refusing to allow plaintiff's expert witness to give opinion testimony as to whether defendant's treatment of plaintiff complied with the appropriate standards of care, since the witness was a family practitioner and a professor of family medicine at U.N.C. Medical School, was familiar with standards of practice for family practitioners and internal medicine practitioners, and was therefore qualified to express an opinion; the witness reviewed defendant's office records, plaintiff's hospitalization records, the outpatient records of physicians who saw plaintiff after surgery, and the depositions of both plaintiff and defendant, and the witness therefore had a proper basis for his opinion; and the questions put to the witness were properly worded and framed.

2. Physicians, Surgeons, and Allied Professions § 17— malpractice—appendicitis—standard of care—sufficiency of evidence

The trial court in a medical malpractice case erred in directing verdict against plaintiff where it could be inferred from defendant's testimony that the standard of care recognized and followed by doctors in the community required further examinations and treatment when patients with abdominal pain of unknown origin failed to improve after a day or so and got worse, and plaintiff's testimony tended to show that the medical care he received from defendant did not meet that standard. Furthermore, even without defendant's testimony with regard to standards, the case should have been submitted to the jury since appendicitis, its symptoms and treatment, are not unknown to the public generally; it is common knowledge that doctors who have patients with persistent, continuing abdominal pain and other symptoms of appendicitis usually attempt to ascertain the cause of the pain and other signs and symptoms by some means and usually do not remain inactive for two or three days while the condition worsens; and plaintiff testified that he communicated with defendant and his office over a two-day period about the worsening of his condition but defendant failed to examine plaintiff further and failed to return his last phone call.

3. Physicians, Surgeons, and Allied Professions § 15— malpractice—phone calls to physician—evidence improperly excluded

In a medical malpractice case where the outcome of the case depended upon whether three phone calls were made by plaintiff patient and received by defendant doctor, the trial court erred in refusing to permit plaintiff to question defendant about his and his office's procedures for getting phone messages to the doctors called and about the fact that a page of the office's phone logbook which contained a reference to a phone call from plaintiff was marked "void."

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APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 26 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 6 December 1983.

Plaintiff's suit is for negligently failing to diagnose and treat his case of appendicitis.

On 5 March 1978, plaintiff began having abdominal pain and vomited and the next day consulted Dr. Pollock because his regular doctor was out of town. In examining plaintiff Dr. Pollock found tenderness in the periumbilical area, concluded that he had gastroenteritis, prescribed an antispasmodic, and told plaintiff to call back if his condition did not improve. Plaintiff testified that his condition worsened and on 7 March 1978 he telephoned Raleigh Internal Medicine Association, with which organization Dr. Pollock was associated, told them that, and in response thereto Dr. Pollock called him back and prescribed Darvocet, a pain medication. But the medication did not alleviate his condition, according to plaintiff, and on Wednesday, 8 March, he telephoned defendant's office again, but received no return call. Dr. Pollock testified that: He never talked with plaintiff after the initial office visit; prescribed the pain medicine over the phone only because plaintiff informed the office that he had forgotten to request it; received no message from plaintiff on Wednesday; the office phone message ledger, which he examined, contains no account of it. On Thursday, 9 March, plaintiff called his regular physician, Dr. Pierson, who saw him the next morning and put him in the hospital, where emergency surgery was performed, and it was ascertained that plaintiff was suffering from a bowel obstruction caused by an infected and ruptured appendix. During trial the court excluded opinion testimony by plaintiff's only expert witness that the care rendered by Dr. Pollock failed to meet the required standard of care. At the close of plaintiff's evidence the court granted defendants' motion for a directed verdict.

McCain and Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr. and Timothy P. Lehan for defendant appellees.

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PHILLIPS, Judge.

[1] Plaintiff first contends that the trial court erred "by refusing to allow plaintiff's expert witness, Dr. Edward J. Shahady, to give opinion testimony as to whether . . . the defendants' treatment of the plaintiff complied with the appropriate standards of care." We agree.

Dr. Shahady was plaintiff's only expert witness. He practices family medicine in Chapel Hill and is also a professor in and chairman of the Department of Family Medicine at the University of North Carolina Medical School. He testified that he was familiar with the standards of practice for family practitioners and internal medicine practitioners as they existed in March 1978 in Raleigh and other similar communities for the care, treatment and diagnosis of abdominal pain and appendicitis and had reviewed the following materials relating to plaintiff's case: The defendants' office records, the plaintiff's hospital records, outpatient records of physicians consulted after surgery, and the depositions of Dr. Pollock and the plaintiff. Following this testimony the proceedings continued as follows:

Q. And in your review of the records and materials that you earlier described have you formed an opinion as to whether those standards of care as they existed in March 1978 for family medicine and internal medicine practitioners, was complied with in the care, treatment and diagnosis that Dr. Pollock gave to Mr. Chapman?

MR. BLOUNT: Objection.

COURT: Sustained.

Q. Have you formed an opinion as to whether that care and treatment given by Dr. Pollock to Mr. Chapman in March 1978 complied with those standards of care?

MR. BLOUNT: Objection.

COURT: Sustained.

. . . .

JURY RETIRES.

. . . .

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MR. MCCAIN: I would like to include his last answer in the record.

COURT: Certainly, permitted. Court reporter read it back. Doctor may answer for the record proper.

(Last question read aloud.)

A. Yes, I have formed an opinion.

Q. What is that opinion?

A. That they did not conform to the standard of care.

Evidence was then offered about how the care and treatment rendered by Dr. Pollock failed to comply with the appropriate standard of care. Following a conference between the court and counsel the jury returned and the examination of Dr. Shahady continued as follows:

Q. Dr. Shahady, in forming your opinion as to whether there was compliance with the standards of care, what basis in the materials given you—what facts formed the basis for your opinion?

MR. BLOUNT: Objection.

COURT: Sustained.

Q. Dr. Shahady, in forming your opinion as to whether there was a compliance with the standards of care for internal medicine and family medicine practitioners in March 1978, in the Raleigh or other similar communities, what materials did you consider in forming such an opinion?

MR. BLOUNT: Objection.

COURT: Sustained.

Q. Dr. Shahady in your review of the materials which were given to you for review, did you form an opinion satisfactory to yourself and to a reasonable medical probability, as to whether or not the care and treatment given by Dr. Morris Pollock in March of 1978 to Luther Frank Chapman, complied with the standards of care for that time period, that is March of 1978, in the Raleigh or other similar communities?

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MR. BLOUNT: Objection.

COURT: Sustained.

MR. MCCAIN: We would request that answer, your Honor.

. . . .

JURY RETIRES.

COURT: You may now answer the last question for the Record proper only.

A. I do have an opinion.

Q. What is that opinion?

A. That it did not conform to the standards.

COURT: Bring the jury back.

The plaintiff concluded his examination without asking any other questions and there was no cross-examination.

Plaintiff excepted to and assigns as error the exclusion of the above quoted testimony, all of which was excluded pursuant to general objections. When a general objection is sustained it will generally be upheld if there is any reason to exclude the evidence. 1 Brandis N.C. Evidence § 27 (1982). Thus, the several possible grounds for the exclusion must be considered. Certainly, the evidence could not have been properly excluded under the theory that the witness was not qualified as an expert. "An expert witness is one better qualified than the jury to draw appropriate inferences from the facts." *Cogdill v. Highway Commission*, 279 N.C. 313, 321, 182 S.E. 2d 373, 378 (1971). As a licensed physician that treats patients with abdominal complaints, teaches medical students and other doctors with respect thereto, and claims to be familiar with the standards prevailing in the community for treating such complaints, Dr. Shahady was certainly qualified to express an opinion as to whether Dr. Pollock had complied with those standards.

The next possibility for excluding the testimony that occurs to us is that no proper basis for Dr. Shahady's opinions was established. "A physician, as an expert witness, may give his

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opinion, including a diagnosis, based either on his personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence." *State v. Wade*, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979). We are unable to determine precisely what information Dr. Shahady relied upon in forming his opinion, because plaintiff's attempts to ascertain this information were frustrated by the court's rulings sustaining defense counsel's objections to those questions. Nevertheless, it is plain from Dr. Shahady's earlier testimony that he had reviewed the office records of Dr. Pollock, the patient's hospitalization records, the outpatient records of physicians who saw plaintiff after surgery and the depositions of both the plaintiff and defendant doctor—all of which, under the guidelines laid down by our Supreme Court in *State v. Wade, supra*, a physician can rely upon in forming an expert opinion. Therefore the exclusion cannot be upheld on this ground.

Another possible ground argued for by defendants is that plaintiff improperly framed his questions by asking whether the treatment rendered by Dr. Pollock complied with the standards for family medicine and internal medicine practitioners. According to them, the witness could only be questioned as to the practices and standards of internal medicine specialists, since that is Dr. Pollock's specialty. This is not and cannot be the law. If it was, many of those who practice in narrow specialties would be immunized from accountability for their incompetence or derelictions due to the inability of their patients to get a specialist in their field to testify against them, which not only would be unjust, but unjustifiable, since doctors in one field can often throw light on what is proper treatment in another. The anatomical, physiological, and bacteriological problems relating to human illnesses and their treatment do not change because a medical specialist in one field instead of another is the examining or treating physician. Thus, though Dr. Pollock can only be held to the standards of internal medicine specialists, evidence as to what other experienced, qualified medical doctors do in treating the same illness is certainly relevant thereto. In the unlikely event that a patient manifesting the signs and symptoms of appendicitis required one treatment when examined by an internist and another when examined by a family practitioner, Dr. Pollock could have

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so testified; but that would not have eliminated the admissibility of Dr. Shahady's testimony, the weight of which would have been for the jury. But Dr. Pollock did not so testify; his earlier testimony was that the standards of care for diagnosing and treating appendicitis are the same for family medicine and internal medicine practitioners. This, in effect, left the argument made now without basis.

The only other possible ground for excluding the testimony that occurs to us is the wording of the questions. But though plaintiff's questions were not as precisely formed as they might have been, their wording was reasonably adequate under the circumstances that existed, and the evidence could not have been properly excluded on that ground. Since no proper basis for excluding Dr. Shahady's testimony has been found, we conclude that the court erred in rejecting the testimony and plaintiff is entitled to a new trial. The prejudicial effect of the exclusion is plain.

[2] Plaintiff next contends that the court erred in directing a verdict against him in that the evidence presented raised a factual dispute for the jury even without the testimony of Dr. Shahady. It is rudimentary, of course, that in determining this question plaintiff's evidence must be taken as true and considered in the light most favorable to him, and that the dismissal can be upheld only if the evidence so viewed is insufficient as a matter of law to justify a verdict. Even though expert testimony is usually needed to establish what the practices and standards of doctors in a particular specialty and area are, "[w]hen the standard of care . . . is once established, departure therefrom may, in most cases, be shown by non-expert witnesses." *Jackson v. Mountain Sanitarium, et al.*, 234 N.C. 222, 227, 67 S.E. 2d 57, 62 (1951). Plaintiff contends that Dr. Pollock's own testimony that patients with continuing abdominal pain usually require continuing treatment of some kind showed what the proper standard of care was, and that plaintiff's testimony that such treatment was not received showed that the standard was departed from. The testimony of Dr. Pollock that plaintiff relies upon in this connection was as follows:

Q. Did you want to talk to him to find out about the nature of the pain and so forth, before you prescribed pain medication for it?

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A. I felt that had his pain gotten much worse that he would have communicated that to us and if that were the case, then I would have, as we had seen him the day before, had him come back that day if we had an indication that his pain had gotten worse.

* * *

Q. And your advice was to call, I believe you said, if not better?

A. Right.

Q. Why did you want him to do that?

A. Oftentimes when we see a patient early-on, and appendicitis is particular notorious for this, the symptoms will change and if in that case we would need to see him again, if there was evidence that he was getting worse, and consider other diagnostic alternatives.

* * *

Q. Dr. Pollock, yesterday I was asking you about the advice that you gave to Mr. Chapman when he left your office on March 6, 1978, about to call if no better; was that important advice?

A. Yes.

Q. Why?

A. If his symptoms were to change significantly, because at the time that I had seen him initially I did not feel that he had an acute abdomen, but early-on. In any kind of problem that can cause an acute abdomen, there may not be much in the way of physical findings, so that time is an important factor and the symptoms may change so that we would like to keep a close follow-up and have the patients report to us if they are having problems.

.....

Q. And it is correct that Mr. Chapman did call and report that is it not?

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A. Mr. Chapman called and reported that he forgot to ask for pain medicine the day before, which was the note that is documented in our notes. The fact that he called to tell us that he forgot to ask for the medicine, did not indicate to me that he had gotten worse.

Although Dr. Pollock did not specifically state that the standard of care then recognized and followed by doctors in Raleigh required further examinations and treatment when patients with abdominal pain of unknown origin failed to improve after a day or so and got worse, that is clearly inferable from his testimony. And since plaintiff's testimony tended to show that the medical care that he received from Dr. Pollock did not meet that standard, it was improper to take the case from the jury in any event.

But leaving Dr. Pollock's testimony about standards aside, as has been noted already not all things about the practice of medicine have to be testified to by a doctor. *Jackson v. Mountain Sanitarium, supra*. The proper medical standards for treating some illnesses and conditions are matters of common knowledge. "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E. 2d 616, 617 (1947). "When the evidence of lack of ordinary care is patent and such as to be within the comprehension of laymen, requiring only common knowledge and experience to understand and judge it, expert testimony is not required." *Wilson v. Martin Memorial Hospital, Inc., et al.*, 232 N.C. 362, 366, 61 S.E. 2d 102, 105 (1950). Appendicitis is not an obscure medical problem unknown to people generally and the practices of physicians in undertaking to diagnose it are not known only to them. It is a matter of common knowledge, we believe, that doctors who have patients with persistent, continuing abdominal pain and other symptoms of appendicitis usually attempt to ascertain the cause of the pain and other signs and symptoms by some means and usually do not remain inactive for two or three days while the conditions are not only continuing, but getting worse. And it is also commonly known that when the condition is appendicitis, simple, usually effective means for ascertaining that and removing the diseased appendix before it ruptures and spreads infection throughout the body are available to the profession and usually employed. Precisely which test or means to use and when

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in making the diagnosis is, of course, a medical matter that is not commonly known; but that it is improper for a doctor to do nothing under such circumstances is, since such conditions, if untreated, entail imminent and grave danger to life and health. In regard thereto, plaintiff testified that: He informed the Raleigh Internal Medicine Association on Tuesday morning his condition had worsened; when Dr. Pollock called him back pursuant thereto he told him the same thing, and that without examining him again or doing anything else, the doctor merely prescribed a pain medication. And upon him again telephoning the Association office on Wednesday morning that his ailments had worsened, he was told that Dr. Pollock would call him back, but he failed to do so. Even in the absence of expert testimony about proper standards of care, this evidence was sufficient, in our opinion, to support the inference that Dr. Pollock's failure to examine and treat plaintiff further under the circumstances testified to was contrary to medical standards approved and generally followed by the profession, and thus negligent.

[3] Plaintiff also contends that several other lines of evidence material to his case were improperly excluded by the trial court. With one exception these questions will not be discussed, as they are unlikely to arise upon retrial. Critical to the outcome of the case, however, is whether plaintiff telephoned defendants' office on three occasions following Dr. Pollock's examination of him, as he testified; indeed, the outcome of the case depends much more on whether these calls were made and received than it does on evidence about proper standards of medical care, discussed at length in both briefs. Because, except for the first call, which defendants contend imparted no information about his condition and merely requested a prescription for pain medication, the defendants deny that the calls were made or received; whereas, the medical standards that apply to each eventuality are scarcely debatable. If the calls were not made to the Association office as plaintiff contends, nothing further could have been conceivably expected of Dr. Pollock and no basis for imposing liability on the defendants would exist. On the other hand, if the calls were made and received by either Dr. Pollock or the Association office, which he held out to his patients as the place to telephone and leave messages, then it is equally clear that duty required Dr. Pollock to take some action commensurate with the information received

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or left with his agent. Nevertheless, despite the dispute and its importance, plaintiff was not permitted to question Dr. Pollock about his and the Association's office procedures for getting telephone messages to the doctors called and about the fact that a page of the Association's phone logbook which contained a reference to a telephone call from plaintiff was marked "void." Evidence about these and related matters was relevant and material to this pivotal issue and it was error to exclude it.

A new trial is therefore ordered consistent with this opinion.

New trial.

Judges ARNOLD and JOHNSON concur.

WILLIAM B. STARLING, JR. AND WIFE, PATRICIA D. STARLING v. WALTON
H. SPROLES AND WIFE, JANICE S. SPROLES, HAROLD L. PARKER AND
WIFE, JOANNE S. PARKER AND HAROLD L. PARKER T/D/B/A HAROLD
PARKER REALTY COMPANY

No. 835DC179

(Filed 17 July 1984)

**Contracts §§ 29, 29.4— conveyance of house—assumable loan—interest rate—
measure of damages—mitigation**

In an action to recover damages for breach of warranty and breach of contract to convey real property where plaintiffs contended that defendants contracted to sell them a house with an assumable loan of 8¼% but the interest rate was in fact 9½%, the trial court applied the appropriate measure of damages, which was the present value of the difference over the term of the loan between the 8¼% interest rate and the 9½% interest rate; furthermore, plaintiffs' conduct in contacting defendant numerous times in an attempt to work out the change in the interest rate amounted to an adequate attempt to mitigate their damages.

APPEAL by defendants from *Lambeth, Judge*. Judgment entered 7 October 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 18 January 1984.

This is an action for damages for breach of warranty and breach of contract to convey real property. The alleged breach concerned a provision in the real estate contract stating that the

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interest rate of an assumable loan secured by a Deed of Trust on the subject property was $8\frac{3}{4}\%$. Several months after the conveyance to the plaintiffs of the real property by the defendants Harold L. Parker and wife, Joanne S. Parker, and the Harold Parker Realty Company, the plaintiffs learned that the interest rate on the loan for their property was not in fact $8\frac{3}{4}\%$, but was $9\frac{1}{2}\%$ per annum. Plaintiffs, William B. Starling and wife, Patricia D. Starling, subsequently instituted this action against defendants seeking, *inter alia*, recovery of the sum of \$15,000 as damages for breach of contract or breach of warranty.

The matter was heard before the District Court Judge sitting without a jury. Extensive findings of fact were made by the trial court, which, in summary, show the following events to have occurred: In January, 1978, the plaintiffs contacted L. H. "Bill" Taylor, an agent for defendant Harold Parker Realty Company, regarding a house located at 334 Scottsdale Drive advertised for sale by the defendant realty company. Plaintiffs informed Taylor that they needed a home which fit several criteria, including a price range of \$35,000 to \$45,000; an assumable loan of less than 9%; 1,500 to 2,000 square feet in size; and having a down payment of less than \$13,000. Plaintiffs looked at other houses but did not make an offer to purchase because the interest rates were higher than $8\frac{3}{4}\%$.

On 15 January 1978, the plaintiffs made an offer "to purchase the property located at 334 Scottsdale Drive," and agreed "to pay for said property the sum of \$40,500," to be paid in the following manner: \$500 in earnest money; \$5,400 at closing; and "\$34,600, the balance of the purchase price to be financed on the following basis: Approx. Assumption of existing $8\frac{3}{4}\%$ loan with PS&L [Peoples Savings & Loan Association]. Payments of approx. \$351 per month."

Plaintiffs' offer to purchase was accepted on 16 January 1978, by defendant Harold L. Parker, for defendants Walton H. Sproles and wife, Janice S. Sproles, the then owners of the subject real property. The transfer was completed by the recording of the Deed from the defendants Parker to the plaintiffs for the property located at 334 Scottsdale Drive, on 26 January 1978.

Previously, on 28 March 1977, the defendants, Mr. and Mrs. Sproles, had entered into an agreement with Peoples Savings &

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Loan Association (PS&L) whereby the interest rate on their loan with PS&L, secured by a Deed of Trust on the subject property, would be lowered from $9\frac{1}{2}\%$ to $8\frac{3}{4}\%$, with PS&L reserving the right to raise the interest rate back up to as high as $9\frac{1}{2}\%$. The agreement was made so that the Sproles could benefit from a lower rate while interest rates in general were at a reduced level at that time.

Agents for the Harold Parker Realty Company had knowledge of the agreement between the defendant Sproles and PS&L prior to the plaintiffs being shown the house. However, the plaintiffs were not informed of the agreement and the potential problem with maintaining the $8\frac{3}{4}\%$ interest rate until plaintiffs received a letter from PS&L dated 28 April 1978, informing them of the agreement and notifying them that the interest rate would initially be increased to 9%. The letter also informed the plaintiffs that the original interest rate on the loan was $9\frac{1}{2}\%$ and that their new rate of 9% would become effective on 1 June 1978.

The plaintiff, Patricia D. Starling, called L. H. "Bill" Taylor on several occasions following receipt of the 28 April 1978 letter from PS&L. Mrs. Starling asked that Taylor look into the problem of the interest rate, since the offer to purchase contract provided for an $8\frac{3}{4}\%$ interest rate on the assumable loan.

On or about 21 July 1978, plaintiffs received a second letter from PS&L, dated 21 July 1978, informing them that the interest rate charged on their loan was to be increased to $9\frac{1}{2}\%$. The effective date of the increase from 9% to $9\frac{1}{2}\%$ was to be 1 September 1978.

Mrs. Sproles had continued to contact Taylor on several occasions during the three month period following receipt of the April, 1978 letter from PS&L, and continued to discuss the problem with Taylor as late as 1979, when both were then employed at North State Realty. Mrs. Starling was assured by Taylor that he would look into the matter of the interest rate and, upon later phone calls, Taylor assured the plaintiff that he would take care of the problem with the interest rate. During the time period when Taylor was still an agent of the Harold Parker Realty Company, no action was taken by him and no one from that company contacted plaintiffs about the problem. The interest rate then re-

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mained at 9½%. For financial reasons, the plaintiffs chose to remain in the house located at 334 Scottsdale Drive.

Plaintiffs' evidence of damages was offered through Thomas Burke, a statistician and Professor of Economics at the University of North Carolina at Wilmington. Burke testified to the economic loss to the plaintiffs based on an interest rate difference between 8¾% and 9½% over the term of the loan. Burke computed the loss to the plaintiffs over the term of the loan to be the result of the difference in interest rates, then discounted that figure to a present value. The trial court relied upon Burke's computations in awarding damages to the plaintiffs against the defendants Parker.

The defendants' own witness on the issue of damages testified that the value of the property itself would not be affected by a change in the interest rate from 8¾% to 9½%, but conceded that the costs of purchasing the home would be affected by such an increase in interest rates. Further, that a house with an assumable loan at 8¾% would be more desirable to a prospective buyer than a house with an assumable loan at 9% interest.

Judgment was entered for the plaintiffs as against the defendants Parker and Parker Realty Company, from which the defendants Parker and Parker Realty Company (hereinafter "defendants Parker") have appealed.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellants.

J. H. Corpening, II, for plaintiff appellees.

JOHNSON, Judge.

The primary issue presented by this appeal is whether the trial court applied the appropriate measure of damages for the breach of contract to convey real property which included a provision governing the interest rate payable on the assumable loan covering the property. The defendants Parker contend that the contract involved was a simple contract to convey real estate and that the damages, if any, should be awarded under the rule of *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964) and *Johnson v. Insurance Co.*, 219 N.C. 445, 14 S.E. 2d 405 (1941). That measure is basically the difference between the contract price and the mar-

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ket value of the land. Plaintiffs, on the other hand, contend that the method for computing damages when the breach of contract results in a change in interest rate set forth in *Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 258 S.E. 2d 778 (1979), and applied by the trial court herein, is the only measure of damages which will provide adequate relief under the circumstances of this case. We agree.

As the plaintiffs noted in their brief, the issue is one of first impression in this jurisdiction. However, we may be guided in its resolution by general principles of contract law. The general rule for the measure of damages for a breach of contract "is the amount which will compensate the injured party for the loss which fulfillment of the promise could have prevented or the breach of it entailed, so that the parties may be placed as nearly as may be in the same monetary condition that they would have occupied had the contract not been breached." 3 Strong's N.C. Index 3rd, Contracts, § 29.2, citing *Perfecting Service Company v. Product Development and Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963); *Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E. 2d 391 (1957).

The general rule that has been applied to determine damages recoverable for the breach of a real estate contract is as follows: "[T]he damages recoverable for breach of contract by the vendor to convey real estate are only such as may fairly and reasonably be well considered as arising naturally—that is, according to the usual course of things—from such breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as a probable result of the breach. The loss of the vendee's bargain is assessed upon the basis either of the difference between the contract price and the actual value of the land, or the actual value of the land less the amount, if any, remaining unpaid on the contract price. . . ." *Johnson v. Insurance Co.*, *supra*, at 449-450, 14 S.E. 2d at 407. "The measure of damages for breach of contract to convey land is the difference between the contract price and the market value of the land." *Lane v. Coe*, *supra*, at 15, 136 S.E. 2d at 275.

In *Pipkin v. Thomas & Hill, Inc.*, *supra*, the court first observed that a borrower's claim for damages resulting from a lender's breach of contract to lend money is "primarily cir-

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cumscribed by the rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854)," and then summarized the following general principles of recovery:

This rule limits generally the recovery of damages in actions for breach of contract. To recover, a disappointed borrower must not only prove his damages with reasonable certainty, he must also show that they resulted naturally—according to the usual course of things—from the breach or that, at the time the contract was made, such damages were in the contemplation of the parties as a probable result of the breach. Additionally, the borrower must demonstrate that, upon the lender's breach, he minimized his damages by securing the money elsewhere if available. When alternative funds are unavailable, however, the borrower may recover the damages actually incurred because of the breach, subject to the general rules of foreseeability and certainty of proof. (Citations omitted.)

298 N.C. at 284, 258 S.E. 2d at 783. The court then quoted the following formulation of the rule governing the applicable measure of damages from the Restatement of Contracts § 343 (1932):

Damages for breach of a contract to lend money are measured by the cost of obtaining the use of money during the agreed period of credit, less interest at the rate provided in the contract, plus compensation for other unavoidable harm that the defendant had reason to foresee when the contract was made.

298 N.C. at 285, 258 S.E. 2d at 783. The *Pipkin* court concluded that the measure of damages for a breach of contract to borrow money is the present value of the difference between the interest payments owed at the interest rate specified in the contract, and the interest payments actually owed as a result in the breach.

Clearly, the rule of *Johnson* and *Lane* does not properly fit the factual situation in the case under discussion. *Johnson* and *Lane* each involve a failure to convey the real property which was the subject of the contract to convey. In such cases it is entirely appropriate that the measure of damages would be the difference between the contract price and the actual or market value of the property. That is because the use of this measure of damages

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when there is a failure to convey property restores the aggrieved party with the "benefit of the bargain," and places the parties in the same position monetarily as they were in prior to the breach. To apply such a measure in the instant case would overlook the nature of the breach and the result of the breach of contract on the plaintiffs' monetary position.

Defendants Parker primarily argue that *Pipkin* is inapposite, but that if the *Pipkin* rule controls at all, the plaintiffs may not recover because they failed to demonstrate that upon the lender's breach, they minimized their damages by securing the money elsewhere, if available. We disagree with both contentions.

The common thread in cases determining the measure of damages upon the breach of any type of contract is the goal of placing the parties in the same monetary position they would have been in had the contract not been breached. In this case, the breach involved a change in the interest rate on the loan from the 8¾% rate which was set out in the real estate contract to the higher rate of 9½% per annum. A change in the interest rate on the loan does not fully affect a party at one time, but rather continues to affect a party over the entire term of the loan during which the change in interest is in effect. The damage to plaintiffs here arises from the additional costs of purchasing the home over the term of the loan. In order to return plaintiffs to the promised monetary position, the court must look to the change in the interest rate and the effect of that change over the term of the loan on the plaintiffs.

In *Pipkin*, the court articulated a method for computing damages when the breach of a contract results in a change in interest rate: the appropriate measure is the present value of the difference in the interest rate set out in the contract and the interest rate resulting from the breach of the contract over the term of the loan. The rationale behind the *Pipkin* measure is clearly applicable to the case under discussion.

Plaintiffs unquestionably suffered a foreseeable monetary loss as a result of the breach; they requested and were promised an assumable loan at an 8¾% interest rate and they ultimately received the loan with a 9½% interest rate. Defendants' own witness admitted that the differential in interest rates would affect the cost of money used to purchase the home and, in turn, af-

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fect the total purchase price of the home itself. Further, that a house purchasable at 8¾% interest is more attractive to a prospective buyer than a home purchasable at 9½%. Therefore, defendants' own evidence as to damages establishes plaintiffs' loss and lays the foundation to apply the *Pipkin* rationale to measure such loss. By combining the general rule of damages for breach of contract and the rule set out in *Pipkin* for computation of damages when the breach causes a difference in interest rate, the present value of the resulting economic loss of the plaintiffs over the term of the loan can be computed and the plaintiffs placed in essentially the same monetary condition that they would have occupied had the contract not been breached.

Returning to the issue of mitigation of damages, we conclude that plaintiffs' failure to secure an 8¾% loan elsewhere does not stand as a bar to their recovery for defendants' breach. In *Pipkin*, the lending institution itself breached the contract with the plaintiffs. In this case, the breach was occasioned by the actions of the real estate agents in the preparation of the Offer to Purchase contract, and in their failure to disclose the "problem" with the interest rate on the loan which was to be assumed by the plaintiffs. Rather than contact the lender with whom plaintiffs had no direct dealings, the plaintiff, Patricia Starling, on several occasions contacted the real estate agent who handled the sale of the property and by whose contract the 8¾% interest rate was promised. The real estate agent gave plaintiff assurances that the matter would be looked into and then took no action. Although the evidence indicated that residential loans at 8¾% were available during April and May of 1978, it was during these particular months that plaintiffs were attempting to remedy the problem with the interest rate by contacting the agent for Harold Parker Realty Company, and were receiving assurances that it would be looked into. During this period it was the inaction of the defendant realty company's agent, not the inaction of the plaintiffs, that resulted in a failure to obtain favorable refinancing.

The trial court made findings of fact and conclusions of law to the effect that plaintiffs made a sufficient effort to mitigate the damages arising from the breach of warranty contained in the contract by contacting the agent regarding the increase in the interest on the loan. Under the circumstances of this case, we find

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no error in the court's findings and ruling on the issue of mitigation.

Plaintiffs' witness, Professor Burke, computed the damage to plaintiffs by determining the difference between the payout over the term of the loan at $8\frac{3}{4}\%$ interest and that at $9\frac{1}{2}\%$ interest rate, and by then discounting that amount to a present value. Based upon these computations, and taking into account the standard deviation, the trial court awarded a judgment for the plaintiffs against the defendants Parker in the sum of \$6,200, which was the minimum figure presented by Professor Burke. Defendants Parker do not contest the accuracy of the computations.

Under the facts presented, the findings of the trial court and the general rules of contract law, we conclude that the method of computing plaintiffs' damages was proper and was accurately applied in this case. Accordingly, the plaintiffs are entitled to the damages awarded by the trial court.

Defendants Parker also argue that the conduct of the plaintiffs in contacting L. H. "Bill" Taylor, the real estate agent who handled the sale of the property, and who was an agent of Harold Parker Realty Company, constituted a waiver of the contract term related to the $8\frac{3}{4}\%$ interest rate. We need not directly address the issue of waiver, however, because defendants failed to raise this affirmative defense by their pleadings required by law.

It is well established that waiver, or the facts constituting the basis thereof, must be specifically pleaded. *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E. 2d 476 (1968). G.S. 1A-1, Rule 8(c) provides that "[i]n a pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . waiver, and any other matter constituting an avoidance or affirmative defense." This defendants have failed to do, and they may not raise the issue for the first time on appeal.

We have carefully reviewed defendants' remaining assignments of error and find them to be without merit. The trial court applied the appropriate measure of damages in this case, which is the present value of the difference over the term of the loan between the $8\frac{3}{4}\%$ interest rate, which was contained in the contract, and the $9\frac{1}{2}\%$ interest rate, to which the assumable loan was raised. Plaintiffs' conduct in attempting to mitigate their

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damages was adequate under the circumstances of this case. Accordingly, the judgment of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge WEBB concur.

SHERRON L. TUCKER WALKER v. CLETUS RAYVON TUCKER

No. 8318DC937

(Filed 17 July 1984)

1. Divorce and Alimony § 24.8— child support—changed circumstances—needs of supporting parent not shown

The trial court erred in ordering defendant to pay the sum of \$150 per month for the support of one of his minor children without making specific findings of fact regarding his needs for the support of himself and the child in his custody.

2. Divorce and Alimony § 24.8— child support—changed circumstances—past expenses not shown

The trial court erred in ordering that defendant pay an increase in child support, although the court made findings of fact which indicated that the needs of the child had increased, since there was no finding as to the actual past expenses of the child which was required to show a substantial change of circumstances. G.S. 50-13.7.

3. Divorce and Alimony § 27— child support order vacated—award of attorney's fees vacated

Because that part of the trial court's order increasing child support payments is vacated, the award of attorney's fees to plaintiff is also vacated.

APPEAL by defendant from *Yeattes, Judge*. Judgment entered 27 April 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 5 June 1984.

Plaintiff Sherron L. Tucker Walker and defendant Cletus Rayvon Tucker are the parents of two minor children, Cletus Rayvon Tucker, Jr. (Von) and Tabatha Sharene Tucker (Tabatha). On 18 January 1978, when both children were residing with the plaintiff mother, the parties entered into a consent order whereby plaintiff would have custody of the children and defendant would

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pay to plaintiff the sum of \$260 per month for their support until each child reached the age of eighteen years.

In June of 1982 Von Tucker moved out of the house being occupied by his mother, sister, and stepfather and moved in with his paternal grandmother. In December of 1982 Von moved in with defendant with plaintiff's permission. Defendant paid \$260 per month to plaintiff for the support of the children until January of 1983 and paid an additional \$260 in March of 1983.

On 18 February 1983 defendant filed a motion requesting that he be granted custody of the two minor children and that plaintiff be required to contribute to their support or, in the alternative, that he be granted custody of Von Tucker and that each parent be directed to support the child in his or her custody. Plaintiff then filed a counter-motion on 9 March 1983 seeking an increase in the amount of support payable by defendant.

On 27 April 1983 a hearing was held before the Honorable John F. Yeates, Jr. at which time the court ruled that custody of Tabatha Tucker remain with plaintiff. Upon stipulation of the parties, the court ruled that the custody of Von Tucker be awarded to defendant. Defendant was ordered to pay \$150 per month for the support of Tabatha Tucker and was also directed to pay \$400 for plaintiff's attorney's fees. From this order, defendant appeals.

Charles L. Cromer for defendant appellant.

Wyatt, Early, Harris, Wheeler and Hauser, by A. Doyle Early, Jr., for plaintiff appellee.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in ordering him to pay the sum of \$150 per month for the support of Tabatha Tucker without making specific findings of fact regarding his needs for the support of himself and the child in his custody, Von Tucker. We agree and hold that the order is vacated and the cause remanded for further findings.

The statute which controls the determination of child support is G.S. 50-13.4(c), which provides:

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Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

In other words, the court must consider not only the needs of the child, but also the ability of each parent to pay. *Roberts v. Roberts*, 38 N.C. App. 295, 248 S.E. 2d 85 (1978). The ability to pay should be indicated by the order of child support, in which the court must make specific findings of fact which take into account the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. *Dishmon v. Dishmon*, 57 N.C. App. 657, 292 S.E. 2d 293 (1982). Specifically, these findings must address the living expenses incurred by the parties. See *Poston v. Poston*, 40 N.C. App. 210, 252 S.E. 2d 240 (1979).

In the case at bar, the court made the following pertinent findings of fact:

6. The needs of the minor child have increased substantially since the previous Orders of this Court, and said minor child has present individual monthly needs as follows:

Food at home	—	\$160.00
School lunches	—	30.00
Clothing	—	20.00
Personal care	—	10.00
Recreation	—	20.00
Uninsured medical and dental expenses	—	10.00
Educational expenses	—	7.00
Prescription drugs	—	10.00
		<hr/> \$267.00

7. The plaintiff has remarried and she and her present husband have reasonable fixed expenses of \$905.00 for house payment, household maintenance and repair, electricity, water, telephone, the plaintiff's car payment and maintenance, gas and insurance on the plaintiff's car.

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8. During 1982, the defendant received \$10,523.54 as compensation from ABC Bonding Company of Winston-Salem, Inc., received approximately \$3,150.00 in rents for two trailers that he owns, for a total gross reported income of \$13,673.00 in 1982. In 1981, the defendant had four W-2s and reported a total of \$22,013.00 income, and the defendant had approximately \$2,405.00 in income from rental of his two trailers. The defendant has liquidated his security and personnel business and is currently seeking employment. The defendant has a note receivable of which \$3,000.00 was paid to him in January, 1983 and the balance of \$4,500.00 is payable to the defendant in June, 1983. These proceeds were derived from the sale of Alpha Company. As of December 31, 1982, the defendant and his present wife had a balance of \$3,020.71 in their joint savings account and for the last 14 months prior to the hearing of this matter, there were deposits in the joint account of the defendant and his present wife of \$41,304.00, for an average deposit of \$2,950.00 per month. According to the defendant, approximately \$15,000.00 of these deposits were due to his present wife's income, several thousand were attributable to simply transfers of funds for the purchase of certificates of deposit. For the period ending January 6, 1983, there was \$2,260.00 deposited in the account, for the period ending February 3, 1983, there was \$1,654.00 deposited in this account, and for the period ending March 3, 1983, there was \$1,260.00 in the account, with an ending balance of \$1,384.41 as of March 3, 1983. The defendant owns his home as tenants by the entirety with his present wife and owns two other pieces of real estate in his name individually. There is substantial equity in all the real estate owned by the defendant, as well as the homeplace which is valued by the defendant at approximately \$37,000.00 with a \$28,000.00 indebtedness. The defendant owns two mobile homes with no indebtedness on them, and rents them for approximately \$350.00 per month. The defendant owns a 1979 Thunderbird automobile, a 1974 Chevy automobile, a 1974 Oldsmobile automobile, a 1967 Dune Buggy and a 1973 Honda Motorcycle. The defendant is an able-bodied man and is capable of earning a substantial income and capable of paying adequate support for the maintenance of his daughter based upon his actual earnings, his present assets and his earning capacity.

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9. The plaintiff had earnings in 1982 from Ladd Furniture Company and Thomasville Medical Associates of \$7,803.86. The plaintiff's net income is \$546.00 per month after deduction of taxes, social security and insurance for herself. Other than the home owned by the plaintiff and her present husband as tenants by the entirety, the plaintiff has no savings account or other assets and is without sufficient funds to defray the necessary expenses of the defense of this action or the prosecution of her counterclaim.

10. Although her needs greatly exceed this amount, the defendant is capable of paying \$150.00 per month for the support of said minor child as his contribution to her support after consideration of income, earning capacity and estate of both parties, the needs of the minor child, the reasonable needs of the plaintiff and the defendant, the fact that the older child is living with the defendant, and such other circumstances as brought to the attention of the Court in this matter.

11. That as soon as the oldest child went to live with the defendant, the defendant cut his \$260.00 per month child support payments to \$130.00 for January and February and ceased all payments for the support of his minor daughter for March and April 1983. The defendant was capable of paying at least \$130.00 per month for March and April 1983 and the minor child had needs far in excess of this amount during those two months, and the defendant should pay this arrearage in child support.

12. As a result of the filing of this action for custody by the defendant, which amount was denied after the defendant's evidence, and as a result of the filing of a motion to decrease child support, which motion was denied after the end of the defendant's evidence, and after a request by the plaintiff that the defendant pay adequate child support, which the defendant had refused to do, the plaintiff was required to retain the services of an attorney to represent her and the minor child in the defense of this action for custody brought by the defendant and for the prosecution of her action to retain custody and to obtain child support arrearage, and an increase in the amount of child support. Said attorney

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has expended in excess of 14-1/2 hours in the representation of the plaintiff and the minor child in this matter including telephone conferences, office conferences, correspondence, negotiations, preparation of pleadings including interrogatories, subpoenas, preparation for trial in the hearing of this matter, and drafting of this Order. In consideration of said attorney's skill and expertise in the area of Family Law and the usual charges by other attorneys of comparable skill and experience in the area of Family Law, the sum of \$60.00 per hour is a reasonable compensation to be paid in this type case, and an attorney's fee of \$870.00 is deemed reasonable. However, under the circumstances of this case, and the consideration of the previous retainer paid by the plaintiff to the defendant, the defendant is only required to pay a portion of the plaintiff's attorney fee in the amount of \$400.00.

Upon reviewing the findings of fact made by the trial court we find that the court committed error in failing to take into account the living expenses of defendant and the minor child, Von Tucker, in determining the award of support.

In support of its conclusion that defendant was able to pay child support in the amount of \$150 per month, the court simply made findings as to defendant's income and various assets. Finding of fact No. 10, in which the court stated that ". . . the defendant is capable of paying \$150.00 per month for the support of said minor child as his contribution to her support after consideration of income, earning capacity and estate of both parties, the needs of the minor child, the reasonable needs of the plaintiff and the defendant, the fact that the older child is living with the defendant, and such other circumstances as brought to the attention of the Court in this matter," is, in actuality, a conclusion of law and, as such, must itself be based on supporting findings. See *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

Although this Court is aware that the trial judge may indeed have given consideration to the expenses of defendant for his own personal needs and the needs of the child in his custody, the fact that the court failed to make specific findings to this effect in its order compels us to order that the judgment be vacated and the cause remanded for further findings. As the Supreme Court of North Carolina stated in *Coble, supra*, "It is not enough that

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there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." 300 N.C. at 712-13, 268 S.E. 2d at 189.

[2] We also agree with defendant that the court erred in ordering that he pay an increase in child support without making specific findings showing a substantial change of circumstances with regard to the needs of the child. Under G.S. 50-13.7, an order of child support may be modified upon motion and a showing of changed circumstances by either party. This Court has held that, in order to show a substantial change of circumstances, "[t]he court must make findings of specific facts as to what actual past expenditures have been to determine the amount of support necessary to meet the reasonable needs of the child for health, education, and maintenance." *Ebron v. Ebron*, 40 N.C. App. 270, 271, 252 S.E. 2d 235, 236 (1979). In the case at bar, although the court made findings of fact which indicated that the needs of the child had increased, there was no finding as to the actual past expenses of the child. The bare statement found in Finding of Fact No. 6 that "[t]he needs of the minor child have increased substantially since the previous Order of this Court," and the accompanying list of monthly needs do not, by themselves, justify an increase in child support. On remand, we direct the trial court to make the appropriate findings of fact with regard to past expenditures made on behalf of the minor child.

[3] In addition, defendant contends that the trial court erred in ordering him to pay plaintiff's attorney's fees. Because that part of the order increasing support payments is vacated, we find that the award of attorney's fees to plaintiff must also be vacated. As stated by this Court in the similar case of *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429 (1980):

The question of attorney's fees must be reconsidered only when and if the issue of whether plaintiff is entitled to an award of increased child support is determined in her favor. At such time, upon reconsideration the trial court must be

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guided by the principles of law stated in the statute, G.S. § 50-13.6, which requires in relevant part:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expenses of the suit.

In our opinion, the court would abuse its discretion if, after determining that an increase in the award of child support was not warranted under the circumstances, it nevertheless proceeded to award attorney's fees to plaintiff.

46 N.C. App. at 485-86, 265 S.E. 2d at 432-33.

Lastly, defendant contends that the court erred in instructing plaintiff's attorney to submit to the court a proposed order, including suggested findings of fact and conclusions of law. Defendant argues that the trial judge should have prepared the order himself, rather than delegate that duty to plaintiff's counsel. We do not agree with this contention. Defendant has cited no authority for his position. Moreover, defendant neither submitted an alternate order nor objected at trial to that order proposed by plaintiff.

In conclusion, the trial court's order is vacated and remanded to District Court, Guilford County, with instructions that the court make those necessary findings of fact with regard to the living expenses of defendant for himself and for the minor child in his custody and with regard to the past expenditures made on behalf of the minor child in the custody of plaintiff. If such findings are in fact made, the court may, at that point, reconsider the issue of attorney's fees.

Vacated and remanded.

Judges WHICHARD and EAGLES concur.

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JUNE G. BENNETT v. HERTFORD COUNTY BOARD OF EDUCATION

No. 836SC633

(Filed 17 July 1984)

1. Schools § 13.2— career teacher—dismissal for physical incapacity—definition

Under G.S. 115C-325(e)(1)e which provides for the dismissal of a career teacher for physical or mental incapacity, physical incapacity refers to a present and continuing inability to perform the duties and meet the responsibilities and physical demands customarily associated with the individual's job as a career teacher in the public schools; furthermore, the incapacity must be in effect at the time action is taken by the board of education, and the projected duration of the incapacity must be long-term or indefinite with no reasonable prospect for rapid rehabilitation.

2. Schools § 13.2— teacher—dismissal for physical incapacity—insufficient evidence

There was no substantial evidence which would support a finding that plaintiff was physically incapacitated at the time of her dismissal as a classroom teacher and no substantial evidence to support the conclusion that she was properly dismissed where all the evidence relating to plaintiff's poor health had as its basis a time period prior to plaintiff's return to the classroom; no evidence of record discredited her performance after her return; absenteeism after her return was not a problem; before and during plaintiff's medical leave of absence from the classroom, she took steps to correct or at least control her problems with medical treatment; and prior to returning to work, plaintiff was certified by a physician as being physically able to return to work.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 18 February 1983 in Superior Court, HERTFORD County. Heard in the Court of Appeals 9 April 1984.

This is a civil action in which plaintiff, a teacher, seeks reinstatement to her job and back pay for her alleged wrongful dismissal from employment with defendant.

Plaintiff was a teacher employed by the Hertford County Board of Education (hereinafter Board of Education) during the 1980-81 school year. Plaintiff had been similarly employed for several years preceding 1980-81 and was a tenured or career status teacher under the Teacher Tenure Act. This law, formerly codified at G.S. 115-142 *et seq.*, was repealed 1 July 1981 and replaced in substantially the same form by G.S. 115C-325 *et seq.*

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Beginning in about 1978, plaintiff began to experience a variety of health-related problems that caused her to have a high rate of absence from her job. Included among plaintiff's complaints were spastic colon, heart damage, migraine headaches, hemorrhaging, hypoglycemia, eye trouble, various joint and bone problems, and some mental problems, notably chronic anxiety, that in turn aggravated and were aggravated by her physical ailments. Some of these ailments were confirmed by medical evidence in the record and some were not. Plaintiff received medical treatment for some of these problems but nevertheless was frequently unable to work or unable to perform some of the duties associated with her teaching position.

Due to an incident in late 1979 involving a fall in her home, plaintiff had been experiencing musculo-skeletal pain. In late summer of 1980, this pain had become more severe and caused her to miss several days of work at the beginning of the school year. On the advice of her personal physician, plaintiff sought specialized help for her problem and obtained a medical leave of absence from her job for the first part of the 1980-81 school year. Plaintiff's problems persisted and her recovery was protracted into 1981. She received corresponding extensions of her leave, finally returning to work on 6 April 1981. She worked for the remainder of the school year, approximately two months, without missing a day and apparently without experiencing any serious health problems.

On 28 April 1981, the Superintendent of the Hertford County Schools initiated proceedings under the Teacher Tenure Act seeking to dismiss plaintiff because of physical incapacity. Plaintiff requested and received a review by a panel of the Professional Review Committee on 23 July 1981. By a majority vote, the five-member committee decided that the charges of physical incapacity were true and substantiated. Accordingly, the Superintendent recommended to the Board of Education that plaintiff be dismissed. Plaintiff requested a hearing before the Board, which was held on 29 September 1981. On 12 October 1981, the Board issued its determination. The determination contained extensive findings of fact detailing plaintiff's medical and work history for the three preceding academic years. Based on those findings, the Board made the following pertinent conclusions:

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2. Physical incapacity in this case doesn't mean a teacher is incapable of being in the classroom. It means a teacher can't put undivided attention on the job or preparing for and teaching students and getting along with co-workers, so that there is a continuing atmosphere conducive [sic] to learning and conducive [sic] to the well being of all involved in the learning process.

3. Despite the few weeks at the end of the 1980-81 school year, three years of past conduct and her medical history are substantial evidence that Ms. Bennett is presently physically unfit for duty.

4. The grounds for the recommendation of the Superintendent are true and substantiated.

Accordingly, the Board of Education ordered plaintiff's dismissal. Plaintiff petitioned the Superior Court for a judicial review of the Board's decision and asserted a claim under 42 U.S.C. § 1983, that the Board's action violated her constitutional due process rights. Defendant Board of Education answered denying the material allegations of the complaint and petition and seeking dismissal of the 42 U.S.C. § 1983 claim for failure to state a claim for relief. The matter was heard on 26 October 1982.

On 18 February 1983, the court entered judgment for the plaintiff, reversing the defendant Board's order of dismissal, and directing that plaintiff be reinstated to her job with back pay. Defendant appealed.

Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, by James C. Fuller, Jr., for plaintiff appellee.

Revelle, Burleson, Lee and Revelle, by L. Frank Burleson, Jr., for defendant-appellant.

EAGLES, Judge.

I

In its 18 February 1983 judgment the Superior Court stated that it had applied the "whole record" test in reviewing the evidence before the Board of Education and reversing the Board's decision. Judicial review of decisions of local Boards of Education

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is pursuant to the Administrative Procedure Act, G.S. 150A-1 *et seq.*, which allows a court to reverse or modify an agency decision "if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are: . . . (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; . . ." G.S. 150A-51(5). *See also Faulkner v. New Bern-Craven County Board of Education*, 311 N.C. 42, 316 S.E. 2d 281 (1984). As distinguished from the "any competent evidence" test and a *de novo* review, the "whole record" test "gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Overton v. Board of Education*, 304 N.C. 312 at 322, 283 S.E. 2d 495 at 501 (1981). *See also Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977); *Goodwin v. Goldsboro City Board of Education*, 67 N.C. App. 243, 312 S.E. 2d 892 (1984).

The task before the trial court, then, was to consider all of the evidence to determine whether the Board's findings as to plaintiff's physical incapacity were supported by substantial evidence.

II

The sole basis of plaintiff's dismissal, according to the record, was physical incapacity. G.S. 115C-325(e)(1)e provides for the dismissal of a career teacher for "physical or mental incapacity." However, physical incapacity as it relates to teacher dismissal is not defined in the applicable law, either as formerly codified or in its present rewritten form, or in the case law of this jurisdiction. The closest analogous situation is to be found in the Teachers' and State Employees' Retirement Act (SERA), G.S. 135-1 *et seq.* G.S. 135-5(c) deals with the eligibility of members of the retirement system for disability retirement benefits. It provides that under certain conditions qualified members may receive a disability retirement allowance if "the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for further performance of duty. . . ." In *Meachan v. Board of Education*, 47 N.C. App. 271, 267 S.E. 2d 349 (1980), *later appealed sub nom. Meachan v. Board of Education*, 59 N.C. App. 381, 297 S.E. 2d 192 (1982), *rev. denied*, 307 N.C. 577, 299 S.E. 2d 651 (1983), we applied this language in

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the context of a career teacher. The plaintiff in *Meachan* suffered from a neurological disorder that affected her teaching performance. Rather than face dismissal proceedings, plaintiff elected to take a medical leave of absence on the advice of the school superintendent. Also on the advice of the superintendent, plaintiff applied for and was granted a disability retirement allowance under SERA. Plaintiff subsequently underwent corrective surgery and was able to return to work the next school year. We held in *Meachan* that a finding of eligibility for disability benefits under SERA was "wholly inconsistent" with one's former status as a career teacher because it implied a finding that the disability was "likely to be permanent." *Id.* at 276, 267 S.E. 2d at 352.

Turning to other areas of law, we find that physical incapacity or disability under our Workers' Compensation law is defined in terms of an individual's capacity to earn wages by his or her work. *E.g., Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Robinson v. J. P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982); G.S. 97-2(9). Where there is an incapacity of an individual that affects his or her availability for work, the incapacity must be operating at the time employment is refused or denied on the basis of unavailability. *See* G.S. 96-13 (availability for employment under Employment Security law).

[1] We hold that physical incapacity under G.S. 115C-325(e)(1)e refers to a present and continuing inability to perform the duties and meet the responsibilities and physical demands customarily associated with the individual's job as a career teacher in the public schools. The incapacity must be in effect at the time action is taken by the Board of Education. The projected duration of the incapacity must be long term or indefinite with no reasonable prospect for rapid rehabilitation. This interpretation of physical incapacity is consistent with the interpretations of similar laws in other jurisdictions. *E.g., Tilton v. Board of Education*, 25 Cal. App. 2d 746, 78 P. 2d 474 (1938); *Gould v. Board of Education*, 32 Ill. App. 808, 336 N.E. 2d 69 (1975); *Smith v. Board of Education*, 293 N.W. 2d 221 (Iowa, 1980). We believe this interpretation is consistent also with the purpose of the Act, as explained by Chief Justice Sharp, "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal

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for political, personal, arbitrary or discriminatory reasons." *Taylor v. Crisp*, 286 N.C. 488 at 496, 212 S.E. 2d 381 at 386 (1975).

III

[2] Our review of the whole record here discloses no substantial evidence of plaintiff's then-existing or continuing physical incapacity to perform her job. At most, the record shows that plaintiff had previously had various health problems that were serious enough to cause her to be absent frequently and to miss much of the 1980-81 school year on a medical leave of absence. Before and during her leave, plaintiff took steps, with varying degrees of success, to correct or at least control her problems with medical treatment. Prior to returning to work, she was certified by a physician as being physically able to return to work. There is no indication that plaintiff's performance upon her return to work was less than satisfactory, and her attendance was perfect. In summary, there is no substantial evidence that will support a finding that plaintiff was physically incapacitated at the time of her dismissal and no substantial evidence to support the conclusion that she was properly dismissed.

All evidence relating to plaintiff's poor health has as its basis a time period prior to plaintiff's return to the classroom in April 1981. No evidence of record discredits her performance after her return. Absenteeism after her return was not a problem. There is, when the whole record is considered, no rational basis upon which the board could conclude, as it did, that at the time of the dismissal proceeding plaintiff was "presently physically unfit."

Although in an appropriate case, i.e., where properly charged, a career teacher may be dismissed under G.S. 115C-325(e)(1) for "inadequate performance," "neglect of duty," and other performance-related reasons, the charge in this dismissal proceeding against this plaintiff was "physical incapacity." Defendant takes the position that plaintiff's physical and health problems had adversely affected her past performance as a classroom teacher and that her past conduct and medical history constitute substantial evidence of her present unfitness for the job. We disagree. While physical incapacity may adversely affect a teacher's job performance, the concepts are nevertheless independent and it does not necessarily follow, as defendant urges here, that poor performance will always accompany less than

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perfect health. Although past performance as a teacher provides some indication of what performance may be expected from the same individual in the future, the same is not necessarily so with respect to past health conditions, especially in view of indications, as here, that past health problems have been alleviated if not cured. *See Gould v. Board of Education, supra.*

The judgment of the trial court is

Affirmed.

Judge BRASWELL concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

In compliance with Rule 16, North Carolina Rules of Appellate Procedure 2d, *Walker Grading and Hauling v. S.R.F. Management Corp.*, 311 N.C. 170 (1984), reversing the decision in the same case reported in 66 N.C. App. 170, 310 S.E. 2d 615 (1984), I state the issue upon which there is a division in this court. It is whether the trial judge erred when he reversed the Board of Education.

Among the several reasons why I consider the decision to be in error is that, in my judgment, the trial judge failed to give appropriate consideration to the evidence that supports the decision of the Board as well as that which detracts. When the evidence that supports the decision is considered, the decision of the Board has a rational basis in fact. Whether the Board's decision has a rational basis in fact is the only question presented on appeal.

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STATE OF NORTH CAROLINA v. CARVIN GERODE COVIEL

No. 8318SC969

(Filed 17 July 1984)

Constitutional Law § 34; Criminal Law §§ 122.2, 128.2— jury not deadlocked—mistrial improper—double jeopardy

Defendant's second trial for the same offenses subjected him to double jeopardy, and defendant's motion to terminate the trial appealed from should have been granted on that ground where the record showed that three felony counts of some complexity involving two distinct incidents and complaints were being tried; the jury deliberated from 1:30 p.m. to 5:15 p.m. on a Friday afternoon; the trial judge asked how they stood and then gave them the charge that is given deadlocked juries; the jury then asked whether there was a time limit when they should stop deliberating and come back the next day or on Monday; the judge refused to answer but instead sent the jury back at 5:24 p.m. for further deliberations; at 6:00 p.m. the judge brought the jury back in and declared a mistrial despite defendant's request that the jury be allowed to continue its deliberations; at that time, the judge did not ask the jury whether any of them had changed their minds since his earlier questioning of them or what their disposition then was in regard to reaching a verdict; and nothing in the record would justify the assumption that the jurors were deadlocked and unable finally to agree upon a verdict.

APPEAL by defendant from *Rousseau, Judge*. Judgments entered 5 May 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 April 1984.

Attorney General Edmisten, by Assistant Attorney General Evelyn M. Coman, for the State.

William H. Dowdy for defendant appellant.

PHILLIPS, Judge.

On May 5, 1983, in a trial presided over by Judge Rousseau, defendant was convicted of second degree kidnapping, armed robbery, and attempted common law robbery, for which he was sentenced to prison for terms of nine years, fourteen years, and three years respectively. Though several assignments of error based on that trial are brought forward, the error that defendant mainly relies upon is based on an earlier trial for the same offenses before Judge Washington, which ended on September 10, 1982 by an order of mistrial. Defendant contends there was no justifiable basis for ending the first trial when the court did and

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that his second trial for the same offenses therefore violated the double jeopardy clause of the Fifth Amendment to the United States Constitution, made applicable to the several states by the Fourteenth Amendment.

Though the ban against trying one twice for the same offense is one of the foundation stones of the common law, was part of North Carolina's jurisprudence before the states united, and is explicitly embedded in the Constitution of the United States, it is not absolute. It has no application to trials that are repeated because circumstances, over which the State and court had no control, unavoidably prevented a prior trial from running its course to verdict; but it does apply to trials that are not completed for unnecessary or merely expedient reasons over a defendant's objection. Circumstances that justify terminating a criminal trial before verdict include, but are not limited to, the serious illness of the trial judge, *State v. Boykin*, 255 N.C. 432, 121 S.E. 2d 863 (1961), juror misconduct, *State v. Tyson*, 138 N.C. 627, 50 S.E. 456 (1905), juror illness, *State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930), and the inability of the jury to reach a verdict, *State v. Honeycutt*, 74 N.C. 391 (1876). The only possible justification for terminating the defendant's first trial, according to the record, was that the jury was unable to reach a verdict; no other possibility is suggested.

With respect to the necessity of discharging the jury in that trial, the record shows the following: The trial began Wednesday morning, September 8, 1982 and the jurors began their deliberations at 1:30 o'clock Friday afternoon, September 10, 1982—the judge's charge having been given immediately before the court recessed for lunch. At 3:29 o'clock the jury returned to the courtroom with questions about the statutes involved, a certain part of the testimony, and an exhibit. The judge and lawyers then conferred, after which the judge recharged the jury to some extent; and at 3:52 o'clock the jury again retired to their room to resume their deliberations. At 5:15 o'clock the jury again returned to the courtroom and the complete proceedings of the court from that time until a mistrial was ordered were as follows:

THE COURT: Ladies and gentlemen of the Jury, I understand from the bailiff that you had a question about what you should do in the event you were not able to agree upon a ver-

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dict. Before speaking to you any further about that, I need to ask you certain questions, and I want to be sure that you understand them. If I ask you about the numerical way in which you stand, I do not want to know whether your vote is for conviction or for acquittal. But I will ask the foreperson of the Jury if you can tell me if you have agreed upon a verdict as to any one of the three charges, and if you have not been able to agree upon any one of the three charges, I will ask you how you stand numerically, and by that, I mean for you to say six to six or ten to two, or something like that, but not whether the first number is for conviction or acquittal or so forth.

I will ask the foreperson to stand, please.

As foreperson of this Jury, may I ask you if you have agreed upon a verdict as to the charges mitigating kidnapping or second degree kidnapping?

JURY FOREPERSON: No, sir.

THE COURT: May I ask you numerically how you stand, if you have voted?

JURY FOREPERSON: Seven to five.

THE COURT: As to the charge of attempted common law robbery or attempted strong-armed robbery, have you reached a verdict as to that?

JURY FOREPERSON: No, sir.

THE COURT: How do you stand numerically as to that?

JURY FOREPERSON: Seven to five.

THE COURT: As to the charge of robbery with a dangerous weapon, this being with regard to Duff's Smorgasbord Restaurant in the early evening hours of January 7, have you agreed on a verdict as to that?

JURY FOREPERSON: No, sir.

THE COURT: May I ask how you stand numerically?

JURY FOREPERSON: Seven to five.

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THE COURT: Have a seat.

Members of the Jury, the laws and the decisions in this state indicate that when a Jury has not been able to agree, the court may give them further instructions.

As sworn jurors in this state, and with the responsibility imposed upon persons selected to serve upon a jury, each juror has a duty to consult with other jurors and to deliberate with a view of reaching an agreement. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with fellow jurors. In the course of deliberations, a juror should not hesitate to reexamine his or her own views, and to change his or her opinion if convinced it is erroneous. Lastly, no juror should surrender his or her own convictions as to the weight or effect of the evidence solely because of the opinion of fellow jurors, or for the mere purpose of returning a verdict. As I have said, your verdict must be unanimous to be accepted by this court. Discussion is essential, and it is essential sometimes to reconsider one's own views and to reconsider one's own recollection, as the case may be.

It is to be hoped that this Jury, which appears to be an intelligent, reasonable group of people, could consider the cases and could arrive at a unanimous verdict. As I said before, none of you can be compelled to give up your own honest convictions.

JURY FOREPERSON: Sir, we were just wondering if we were supposed to keep deliberating tonight, or if there was some time limit that you want us to stop and come back tomorrow or Monday.

THE COURT: For fear that it might be construed as some attempt to coerce you, I don't think I can answer that question.

I will have to ask you to go back to the jury room and see if you can reach a verdict.

(At 5:24 o'clock, p.m., the Jury retired to further deliberate.)

THE COURT: Bring the Jury in.

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MR. CLIFFORD: May I make some remarks on the record?

Your Honor has stated intentions to, at 6:00 o'clock, declaring mistrial if the Jury hasn't reached a verdict. It is now 6:00 p.m. on September 10, 1982, and the Defendant, Calvin Coviell, requests, at this time, that that procedure not be followed and that the jurors be allowed to continue to deliberate. That if the mistrial is declared, this case has to be tried again. The Defendant is not going to be able to afford the expenses of another trial. That I have conferred with the Court Reporter, and I have found that the transcript, if one is ordered, would cost in excess of \$1000. That the attorney's fees for another trial would run in the area of \$5,000. That I simply ask the Court to do something else other than to declare this mistrial, either bring the jurors back tonight, tomorrow, or on Monday, to continue to deliberate.

THE COURT: The request of the Defendant has been heard. It's been considered before this time, and it is denied.

Bring the Jury in.

(At 6:00, p.m., the Jury resumed their places in the jury box.)

THE COURT: Madame foreperson, would you mind standing again.

Has the Jury reached a unanimous verdict on the issue as to second degree or mitigating kidnapping?

JURY FOREPERSON: No, sir.

THE COURT: Has the Jury reached a verdict with regard to the charge of attempted strong-armed robbery?

JURY FOREPERSON: No, sir.

THE COURT: Has the Jury reached a verdict with regard to the charge of robbery with a dangerous weapon?

JURY FOREPERSON: No, sir.

THE COURT: Thank you. Have a seat.

Madame clerk, without any reflection upon the person named, it is the requirement of the law that the name of one juror be drawn, and a mistrial declared if the Jury is unable

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to agree. It is the opinion of the Court that if the jury was deadlocked at seven to five a few minutes after 5:00 today, that there is a definite possibility that a juror or jurors would have to give up honest convictions in order to arrive at a verdict. Therefore, the Court is going to instruct the clerk to provide for me the name of the juror in seat number 12.

THE CLERK: Teresa Smith.

THE COURT: Ms. Smith, without any reflection at all on you, the Court withdraws Teresa Smith and declares a mistrial in each of the three cases.

Ladies and gentlemen of the Jury, sometimes in your readings or from television trials that you have seen, it appears to be easy. These cases involve several complex or complicated propositions. The law, as you perhaps are aware now, is somewhat difficult to apply to a fact situation. There are cases in which the mind of one person may arrive at a decision, but the minds of 12 persons have difficulty in arriving at a unanimous decision. This is one of the reasons for the provision of jury trials, and the reason for it is to assure or safeguard that a person not be found guilty of a criminal offense unless and until a diverse jury of persons from many places and stations in life are brought together to consider the question presented, and to serve as judges of the facts. I recognize that in these cases, there are certain questions of fact which could give you trouble and could give another jury trouble. I regret that there has been a great deal of expense required thus far. It will mean additional expense to have a jury try these cases again, but it is now necessary that this be done, because I feel it is very important that you not be required to give up your own honest convictions about these cases. For your willingness to serve this week, for the inconvenience and hardship that some of you have experienced, I must express my regret, but I will tell you that if the right of a free society and the right of any individual in the society to remain innocent until proven guilty beyond a reasonable doubt to the satisfaction of 12 persons, if this right is to be preserved and made available to you and me and to anyone else, it is necessary to go through this process.

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You will get a check from the clerk later on, and as far as I know, none of you can retire on what you are going to get. If you are called to jury duty within the next two years, please remember that you have served at this time, and insofar as the state courts are concerned, you will not be required to serve on a trial jury or a grand jury, for that matter, within the next two years.

Thank you for your services, and even though we couldn't get the cases decided, I do feel that you made a contribution to the courts, your community, and your state.

(The Jury was excused from further service in this matter.)

The constitutional standard for mistrials in criminal cases that permit the defendants involved to be tried again was laid down by the United States Supreme Court 160 years ago.

[I]n all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .

United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824). As we read it, the record fails to show any necessity, "manifest" or otherwise, for discharging the jury and terminating the trial. And under the law, the record must demonstrate such "necessity" for any mistrial entered over the defendant's objection before the defendant can be tried again; though, of course, the "necessity" that must be shown is practical, not absolute. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717, 98 S.Ct. 824 (1978). The State argues that defendant did not object to the action taken, but merely "requested that the court not declare a mistrial because of the expense that would be incurred by his family if the case was tried again." We do not so interpret defense counsel's remarks. Furthermore, one reason for banning repeated trials for the same offense in the first place was to pre-

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vent people charged with crime from being ruined financially because of the expense and time from business that multiple trials can entail. *Arizona v. Washington, supra*.

Judge Washington's statement that the jury was deadlocked and jurors would have to give up honest convictions in order to arrive at a verdict has no support in the record. All that the record indicates is that the jury was willing to go on with their deliberations even if it meant coming back that night, Saturday, or Monday of the next week; it contains no intimation from them that they were deadlocked and further deliberations would not be productive. The court's misunderstanding about this apparently developed from assuming something that had not been demonstrated. In all events, the record shows that upon being told that the jury had a question about the course to follow in case a verdict was not reached, instead of ascertaining the nature of their problem, the court asked how they stood and gave them the charge that is given deadlocked juries. Whereas, upon their question being finally asked, it had to do with when the deliberations necessary to conclude the case would be done. Nor does the time that the jury had been deliberating justify the assumption that they were deadlocked and unable to finally agree upon a verdict. Three felony counts of some complexity, involving two distinct incidents and complainants, were being tried and that the jury had not reached a verdict after deliberating for approximately four hours, the rest of the time after they received the case being spent in the courtroom, does not require the conclusion that an impasse had been reached.

Furthermore, the law of North Carolina concerning mistrials in criminal cases does not stop with the constitutional standard of "manifest necessity," which for the states is a floor, not a ceiling. In enacting G.S. 15A-1064, a part of Article 62 of Chapter 15A of the General Statutes, "Mistrial," the General Assembly required that "[b]efore granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case." This requirement is mandatory. *State v. Johnson*, 60 N.C. App. 369, 299 S.E. 2d 237, *rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983). For a comprehensive discussion of this statutory requirement, see *State v. Jones*, 67 N.C. App. 377, 313 S.E. 2d 808 (1984). No such findings are recorded, the statement made by the judge being in the nature of an

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opinion that the evidence does not warrant. Indeed, the record does not show how the jury stood when the judge decided to discharge them, whether any jurors had changed their positions after the 7 to 5 votes were taken, or what their disposition then was in regard to reaching a verdict, because they were not questioned about any of these matters.

We are obliged to hold, therefore, that defendant's second trial for the same offenses violated the double jeopardy clause of the federal constitution and also the North Carolina statutes governing mistrials, and that defendant's motion to terminate the trial appealed from on that ground should have been granted. The judgments of conviction against the defendant are hereby vacated.

Judgments vacated.

Chief Judge VAUGHN and Judge WHICHARD concur.

PABLO G. CASADO AND WIFE, CAROL CASADO v. MELAS CORPORATION, MELLOTT CONTRACTORS, INC., AND MELLOTT TRUCKING AND SUPPLY CO., INC.

No. 8315SC1003

(Filed 17 July 1984)

1. Negligence § 10— concurring causes of injury— apportionment of damages not required

Where plaintiffs contended that acts of defendant trucking company resulted in formation of a "delta" on the lake which abutted their property and a portion of which had been conveyed to them, the trial court erred in requiring plaintiffs to establish the degree to which the formation of the "delta" was attributable to defendant, since, where the damage complained of is the indivisible result of several causes, full recovery by a plaintiff does not depend on his ability to apportion the damages; rather, plaintiff needs only to show that the negligence of one defendant was a proximate cause of some of the damage.

2. Waters and Watercourses § 1; Damages § 5— damages from water runoff—impermanent injury—measure of damages

Where plaintiffs contended that the construction of roads in their subdivision by defendant trucking company resulted in siltation and formation of a

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"delta" on the lake which abutted their property and a portion of which had been conveyed to them, the trial court erred in determining that the amount of damage to plaintiffs' property was the diminution in its market value, since the "delta" created by runoff was continuing to accumulate, and it was therefore an impermanent and continuing injury for the purpose of measuring damages.

APPEAL by plaintiffs from *Barnette, Judge*. Judgment entered 15 July 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 7 June 1984.

This is a civil action in which plaintiffs seek compensatory and punitive damages and injunctive relief for damages to their property allegedly resulting from the actions of defendants.

The essential facts of this case are not in dispute and are accurately summarized in the trial court's written judgment:

2. Plaintiffs are owners of Lot 8, Section III of Wolf's Pond Subdivision. The property of the plaintiffs includes a portion of Wolf's Pond surface and the lake bed beneath the surface. Wolf's Pond is a small lake with a surface area of approximately five (5) acres located in the Wolf's Pond Subdivision.

3. Melas Corporation, a defendant herein, was the grantor of the property now owned by the plaintiffs and Melas Corporation sold the other lots located in the Subdivision.

4. The activities of Mellott Trucking & Supply Company, Inc. were undertaken at the direction of and for the benefit of Melas Corporation.

5. Melas Corporation is no longer an active corporation and its only assets consist of the land underlying the roads in the Wolf's Pond Subdivision and the lake bed under the surface of Wolf's Pond.

6. Defendant Mellott Trucking and Supply Co., Inc. is a corporation organized and existing under the laws of the State of North Carolina and the aforesaid defendant performed the road grading and paving for the Wolf's Pond Subdivision.

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7. Plaintiffs contracted with Melas Corporation for the purchase of Lot 8, Section III of Wolf's Pond Subdivision in January of 1973.

8. At the time the plaintiffs purchased their lot in Wolf's Pond Subdivision, the following conditions existed and were observed by the plaintiffs:

- A. The plaintiffs' lot is steep and traversed by two natural gulleys or ravines into which higher elevations of Wolf's Pond Subdivision drain.
- B. The roads for Phase III of Wolf's Pond were in place but had not been paved.
- C. A culvert ran through the base of Wolf's Court at the northeast corner of plaintiffs' lot.
- D. The lake was under construction and was not filled; the ground which would be under water when the lake was filled was firm.

9. Plaintiffs commenced construction of a residence on Lot 8 of Wolf's Pond Subdivision in January of 1974 and occupied the residence in August of 1974.

10. The lake area filled with water during the spring and summer of 1974.

11. Plaintiffs used the lake during the spring and summer of 1974 and did not notice any substantial sedimentation or siltation.

12. Defendant commenced clearing and construction of roads for Phases IV and V of Wolf's Pond Subdivision during the winter of 1974 and the construction operation lasted until the fall of 1975. The areas cleared were "uphill" from the plaintiffs' lot.

13. A portion of the construction process consisted of grading and introduction of "Chapel Hill gravel" as a road base. The road base was "primed" with oil which was designed to hold the base in place until approval for paving was obtained.

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14. During the spring of 1975, the plaintiffs noticed that "Chapel Hill gravel" began moving onto plaintiffs' property each time it rained.

15. On July 2, 1975, the plaintiffs went to Mexico and upon their return on August 8, 1975, they noticed that "Chapel Hill gravel" was at the lake in the area where the "Delta" which is the subject of this action has formed.

16. Shortly after plaintiffs' return from Mexico in August of 1975, following a heavy rain, plaintiffs noticed that the culvert at the northeast corner of their property was obstructed and that water was flowing over Wolf's Court.

17. The defendant was contacted and it was discovered that a third party, unknown, had blocked the northern terminus of the culvert with a plywood board.

18. The overflow caused by the blockage of the culvert "washed away" the southern bank of Wolf's Court to a depth of approximately four (4) feet. The wash from the overflow constitutes a portion of the "Delta."

19. Subsequent to construction of the roadways for Phases IV and V, the defendant unsuccessfully attempted to plant erosion impeding vegetation on the roadside banks.

20. Defendant was informed by the Orange County, North Carolina Erosion Control Office that it was in violation of Erosion Control Statutes.

...

22. The "Delta" is composed of leaves, sticks, "Chapel Hill gravel," and other debris.

23. The plaintiffs obtained an estimate in the sum of \$8,000.00 (in 1982) as the cost of a possible alternative method for use of the area where the lake bottom is heavily silted and the "Delta" exists.

24. The plaintiffs' property continues to be subject to siltation.

25. The plaintiffs offered evidence that a substantial amount of the siltation material resulted from the activities

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of the defendant; however, the plaintiff did not quantify the percentage of siltation resulting from the defendant's activities versus that which naturally occurred or was the result of the culvert blockage and overflow.

26. Removal of the delta would be impractical and could not be accomplished without the incurrence of exorbitant costs.

This action was first brought against all named defendants in 1978. In 1980, the parties executed a Stipulation of Dismissal which resulted in dismissal without prejudice. In February 1981, the action was reinstituted with the same parties named as in the 1978 action. Prior to trial, the parties stipulated that defendant Melas Corporation was defunct and that defendant Mellott Contractors, Inc., had not participated in the work that gave rise to the action.

The matter was tried without a jury on 18 April 1983. On 15 July 1983, the court entered judgment which included the facts quoted above and the following pertinent conclusions:

2. That the defendant's violation of Erosion Control Statutes constitutes negligence on the part of the defendant which proximately resulted in some damage to the plaintiffs.

3. That the "Delta" is a permanent condition and the burden is upon the plaintiffs to establish the degree to which the formation of the "Delta" is attributable to the acts of the defendant as opposed to the forces of nature or the acts of third parties.

4. That the proper measure of damages is diminution in the value of the plaintiffs' property.

5. That no evidence as to diminution in value of plaintiffs' property having been presented, the plaintiffs are entitled to recover nominal damages.

6. That the plaintiffs are entitled to recover attorney fees in an amount to be set by the Court.

Accordingly, the court awarded plaintiffs nominal damages of \$1.00 as well as attorney fees. Based on the pretrial stipulations,

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the action was dismissed as to defendants Melas Corporation and Mellott Contractors, Inc. Plaintiffs appealed.

Winston, Blue and Rooks, by J. William Blue, Jr., for plaintiff appellants.

No brief for defendant appellee Mellott Trucking and Supply Co., Inc.

EAGLES, Judge.

We note at the outset that the trial court's conclusions that defendant was negligent and that its negligence proximately resulted in some damage to plaintiffs' property are not challenged in this appeal. Here, plaintiffs appealed from a judgment in their favor because it awarded only nominal damages. As this Court recently held, a party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be. *New Hanover Co. v. Burton*, 65 N.C. App. 544, 310 S.E. 2d 72 (1983); G.S. 1-271. See also *McCulloch v. R.R. Co.*, 146 N.C. 316, 59 S.E. 882 (1907).

[1] Plaintiffs contend first that the trial court erred in concluding that they were required to establish what portion of the damage complained of was attributable to the acts of defendant as opposed to other causes. We agree with plaintiffs.

Where the damage complained of is the indivisible result of several causes, full recovery by a plaintiff does not depend on his ability to apportion the damages; plaintiff needs only to show that the negligence of one defendant was a proximate cause of some of the damage complained of. *McEachern v. Miller*, 268 N.C. 591, 151 S.E. 2d 209 (1966); *Hester v. Miller*, 41 N.C. App. 509, 255 S.E. 2d 318, rev. denied, 298 N.C. 296, 259 S.E. 2d 913 (1979). In order to hold defendant liable for the entire injury, it is not necessary that his negligence be the sole proximate cause of the injury, or the last act of negligence. *Batts v. Faggart*, 260 N.C. 641, 133 S.E. 2d 504 (1963); *Hester v. Miller*, *supra*. See generally, Prosser, Law of Torts, *Apportionment of Damages* § 52 (4th ed. 1971); 9 N.C. Index 3d, *Negligence* § 10 (1977 and Supp. 1983). Here, it was error for the trial court to require plaintiffs "to establish the degree to which the formation of the 'Delta' is attributable to the acts of the defendant. . . ."

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[2] Plaintiffs next assign error to the trial court's ruling that the proper method for determining the amount of damage to plaintiffs' property was the diminution in its market value. Plaintiffs argue that, because the damage was not permanent, diminution in value was not the proper measure of damages. We agree.

The trial court's findings of fact indicate that the negligence of defendant was still operating at the time judgment was entered and that the resulting damage to plaintiff's property was continuing and was still accumulating. Specifically, the court found that "plaintiffs' property continues to be subject to siltation." Nevertheless, the court concluded that the damage was "a permanent condition" and that the correct measure of damages was the diminution in value of plaintiffs' property.

While the "Delta" created by the runoff may well be "a permanent condition," the fact that it is continuing to accumulate makes it an impermanent and continuing injury for the purpose of measuring damages. *Phillips v. Chesson*, 231 N.C. 566, 58 S.E. 2d 343 (1950), is relevant here. It involved a suit between two private landowners where the defendant landowner had diverted the natural flow of surface water, causing it to flow onto plaintiff's property. The diverted water carried clay and mud which were deposited and accumulated on plaintiff's land. The periodic flooding also caused extensive damage to buildings on the property. In his complaint, plaintiff alleged damages of a recurring nature. The Supreme Court, finding that the evidence supported plaintiff's allegations, nevertheless ordered a new trial because the court erroneously instructed the jury to compute any damages awarded on the basis of diminution in value of plaintiff's property. We quote from Justice Seawell's opinion:

The impermanent nature of the condition from which the intermittent or recurrent damage arises is recognized in the constitution of the case, since the plaintiff has concomitantly with his prayer for damages invoked injunctive relief for its abatement. The cause of the recurring damage, then, is one which may be removed by the voluntary action of the defendant, or abated by court action, if that should be adjudged appropriate. Plaintiff's remedy in a proceeding of this sort, between private parties, is by successive suits brought from time to time against the author of the nuisance as long as the

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noxious condition is maintained, in which he may recover past damages down to the time of the trial . . . not including subjects of prior adjudication. In this way it has been said, . . . the defendant's willingness to abate or remove the cause of damage may be stimulated when repeatedly mulcted in damages by reason of its continued maintenance.

In contrast, permanent damages, as the term is used in the law, are given in one award of entire damages on the theory that all damage flows from the original injury, recognized as permanent in character; and such award includes compensation for all damage, however intermittent, or recurring, past, present and prospective, naturally flowing from and proximately caused by the original injury.

. . .

The great weight of authority where the point has been squarely presented *sine nubibus* clearly rejects the diminution of market value as neither accurate, convenient nor just where, as here, temporary damages only will be allowed, where the cause of the injury is impermanent in the sense that it may be removed by the offender voluntarily or abated by equitable proceedings which the plaintiff has here invoked.

Id. at 569-71, 58 S.E. 2d at 346-48 (citations omitted). *See also Sutherland v. Hickory Nut Co.*, 23 N.C. App. 434, 209 S.E. 2d 301 (1974) (water and sediment damage to plaintiff's property resulting from defendant's upstream land disturbance ruled impermanent as a matter of law by trial court; damages awarded accordingly. Affirmed by Court of Appeals). *See generally* 25 C.J.S., *Damages* § 84 (1966); 12 N.C. Index 3d, *Trespass* § 9 (1978).

Here, as in *Phillips, supra*, plaintiffs have alleged damages of a continuing and recurring nature and seek injunctive relief as well as damages. While the general rule for assessing damage to real property is diminution in market value, that measure is not appropriate where, as here, the damage complained of is "impermanent." In a case involving damages of an "impermanent" nature, "various other rules are applied, such as . . . reasonable costs of replacement or repair." *Phillips v. Chesson, supra* at 571,

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58 S.E. 2d at 348. Clearly, the ruling by the trial court that the proper measure of damages was diminution in value was error.

Plaintiffs' third and last contention on appeal challenges the trial court's ruling that plaintiffs presented no evidence of diminution in the value of their property. Since we have determined that diminution in the value of the property is not the proper measure of damages here, we need not address this contention.

With the exception of the portions relating to the measure of damages, the judgment is affirmed. The portions relating to the measure of damages are vacated, and the cause is remanded for further proceedings on the issue of damages.

Affirmed in part, vacated in part, and remanded.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOSEPH NELSON, JR.

No. 8318SC1113

(Filed 17 July 1984)

1. Physicians, Surgeons, and Allied Professions § 1— practicing medicine without license—statute not vague or overbroad

G.S. 90-18 which prohibits the practicing of medicine without a license is not unconstitutionally vague, since the language of the statute is sufficiently specific to inform a person of ordinary intelligence as to what conduct is prohibited, nor is the language of the statute overbroad, since it does not constitute a blanket proscription against rendering aid to another person but instead specifically excepts the administering of family remedies in cases of emergency.

2. Criminal Law § 116— defendant's failure to testify—no expression of opinion by court

In a prosecution of defendant for practicing medicine without a license, there was no merit to defendant's contention that the trial court improperly expressed an opinion regarding his guilt or innocence by commenting on his failure to testify on his own behalf where the instructions complained of related to defendant's duty to show that he came under one of the exceptions to practicing medicine enumerated in G.S. 90-18; furthermore, the trial court properly instructed the jury not to consider defendant's silence in arriving at its verdict.

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APPEAL by defendant from *Hairston, Judge*. Judgment entered 23 June 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 June 1984.

Defendant was tried upon indictments charging him with five counts of practicing medicine without a license in violation of G.S. 90-18. The State introduced evidence that on two occasions in September of 1982 Martha Bradley Long visited defendant in order to be examined. Long stated that she knew defendant was not a medical doctor, but was a naturopathic doctor and an iridologist. It was stated at trial that iridology is the study of the iris and enables the examiner to look into the patient's eyes and make a diagnosis.

As a result of the examination, which involved the use of a standard blood pressure device along with the iris analysis, defendant told Long that she had severely deficient lungs and instructed her in writing to go on a seven day "cleanse." He sold her a kit which included such ingredients as volcanic ash, psyllium hulls, laxatives, spirulina and garlic capsules.

On a later occasion, defendant sold Long a combination of Sn-x herbs. After taking this medication, Long experienced coughing spells and breathing problems. She informed defendant of her reaction and was sold a number of herbs and chewable vitamins. Long later bought Lobelin extract from defendant and was told to take it to relieve her symptoms. On 4 November 1982 Long was admitted to the emergency room of a local hospital and was treated by a medical doctor for severe breathing problems.

The State also introduced the testimony of William Mills, a retired police officer who was working undercover for the Greensboro police force. Mills stated that on 23 November 1982 he went to defendant's office for an examination. Mills was taking Enderol for high blood pressure and was told by defendant to get rid of the medication, because it was not working. Defendant gave Mills garlic pills and told him they would lower his blood pressure. Defendant also told Mills that he was an iridologist and, after examining Mills' eyes, told him that he had deposits of drugs in his liver, lungs, stomach, large intestine, left leg, and left foot. Defendant gave Mills an herb kit which he stated would remove the drug deposits.

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At a second meeting on 30 November 1982, Mills wore equipment to record his conversation with defendant. During that meeting, defendant told Mills to start a "cleanser," to eat fruits and vegetables only, and to do only as defendant specified for seven days. Mills was also instructed to take a ginger bath in order to remove the poisons from his pores and was given directions as to how to use the herb kit, which he later turned over to the police department.

Defendant was found guilty as charged in all five counts and was sentenced to a term of not less than two years nor more than two years in prison in two of the counts, such sentences to run consecutively. He received a prayer for judgment in the remaining three cases. From these proceedings defendant appeals.

Attorney General Edmisten, by Associate Attorney Sueanna P. Peeler, for the State.

Moses and Murphy, by Pinkney J. Moses, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in failing to grant his motion to dismiss upon the grounds that G.S. 90-18 is unconstitutionally vague and overbroad. We disagree with this contention.

G.S. 90-18 provides in part:

No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this Article. . . .

The statute defines the phrase "practice medicine or surgery" as follows:

Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical

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or mental, or any physical injury to or deformity of another person.

In addition, the statute further narrows the scope of this definition by setting forth 14 exceptions.

The standard to be applied in determining whether a statute is void for vagueness is whether the statutory language gives a person of ordinary intelligence fair notice of what is forbidden by its terms. *State v. White*, 58 N.C. App. 558, 294 S.E. 2d 1 (1982). Moreover, where a statute being challenged as unconstitutionally vague does not involve First Amendment freedoms, it must be examined in light of the facts of the particular case. *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975).

We find that the language of G.S. 90-18 is sufficiently specific to inform a person of ordinary intelligence as to what conduct is prohibited by the statute. The terms "diagnose," "treat," "operate," "prescribe," "administer," "ailment," "injury," and "deformity" are all easily understood by the ordinary person. As for defendant, the evidence presented at trial showed that he held himself out as "Dr. Nelson" and that, although he did not possess a license, he was an iridologist who was able to make diagnoses and prescribe substances for treatment. The record also indicates that defendant was compensated for his services. This conduct clearly violated the terms of G.S. 90-18 and did not fall within any of the 14 exceptions provided by the statute. Defendant had ample notice that his conduct was forbidden by the language of G.S. 90-18. We find, therefore, that the statute is not unconstitutionally vague.

Defendant's argument that the language of G.S. 90-18 is overbroad is also without merit. In *State v. White, supra*, the court summarized the overbreadth doctrine as follows:

[T]he overbreadth doctrine is a separate principle devised to strike down statutes which attempt to regulate activity which the State is constitutionally forbidden to regulate . . . (citation omitted). As stated in *NAACP v. Alabama* (citation omitted) 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

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58 N.C. App. at 562, 294 S.E. 2d at 4. Defendant argues that the statute is overbroad in that it constitutes a blanket proscription against rendering aid to another person. He contends that implicitly prohibited by the statute are such routine, gratuitous acts as removing splinters; treating corns on feet; attending to minor cuts, bruises, and scrapes; diagnosing a cold in a child and administering children's aspirin, orange juice, chicken soup and bed rest; "painting" a sore throat; diagnosing minor constipation and prescribing an over-the-counter laxative; treating a baby's upset stomach; and prescribing a homemade remedy for a hangover. We disagree with this contention for several reasons.

First, the administering of family remedies in cases of emergency is one of the 14 listed exceptions to G.S. 90-18, making such conduct clearly permissible under the statute. Second, the intent of the statute is to protect the public against those who would hold themselves out as medical doctors who would expect compensation in return for those services. We find that this purpose may be implied from the language of G.S. 90-18 which provides that:

if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services.

Third, North Carolina courts have not interpreted the statute to prohibit the rendering of aid to one's family and friends. In *State v. Baker*, 229 N.C. 73, 48 S.E. 2d 61 (1948), the North Carolina Supreme Court stated:

It is undoubtedly true, as the accused contends, that 'the defendant cannot be convicted in this case for doing as an osteopathic physician what he would have a perfect legal right to do as a private citizen,' and that a private citizen can suggest to friends the advisability of taking some medicine without running afoul of the law. But the evidence in this case does not intimate that the accused confined himself to recommending the use of some remedy by some acquaintances.

Id. at 80, 48 S.E. 2d at 67.

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Just as in *Baker, supra*, defendant did not confine his actions to family and friends, but, instead, attempted to diagnose and treat the ailments of at least two people with whom he had had no previous contact. Moreover, defendant expected to be compensated for his services. We find that this is the very conduct which G.S. 90-18 was intended to prohibit. The gratuitous rendering of aid, on the other hand, is not barred by the statute, despite defendant's contention to the contrary.

Finally, G.S. 90-18 does not attempt to regulate constitutionally protected activities, as referred to in *State v. White, supra*. The State is certainly empowered to protect its citizens from those who would attempt to practice medicine without having been duly licensed. In conclusion, we find that the statute is not unconstitutionally overbroad.

[2] Defendant also contends that the trial court improperly expressed an opinion regarding his guilt or innocence by commenting on his failure to testify on his own behalf. In instructing the jury regarding G.S. 90-18, the trial judge stated:

Then it makes certain exceptions. Nurses, under certain conditions acting under the direction of a doctor, physicians from another state that are coming in just occasionally, chiropractors, osteopaths, but it does not cover anything that has been mentioned here. There are no exceptions here. Indeed, if the defendant had intended to bring himself within one of the exceptions, it would have been his duty to show that he could bring himself under the exception. So far as this case is concerned, you need not worry about the exceptions. . . .

Defendant's contention that these instructions constituted an opinion as to his guilt or innocence is fully without merit. Since the State had produced evidence of violations of the statute, it was incumbent upon defendant to introduce evidence that his actions fell within one of the 14 exceptions thereto. As defendant failed to introduce any such evidence, the jury was not required to consider the exceptions to the statute. The instructions by the court were, therefore, a correct statement of the law.

We also note that the court instructed the jury not to consider defendant's silence in arriving at its verdict by stating:

Evans v. Roberson, Sec. of Dept. of Trans.

In this case, the defendant has not testified. The law of North Carolina gives him this privilege. The same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way.

We find that the court's instructions to the jury were proper and that no expression of an opinion was made.

No error.

Judges WHICHARD and EAGLES concur.

WAYNE GRAY EVANS v. WILLIAM R. ROBERSON, JR., SECRETARY OF THE
DEPARTMENT OF TRANSPORTATION FOR THE STATE OF NORTH CAROLINA

No. 8323SC936

(Filed 17 July 1984)

Automobiles § 2.8— license revoked—reinstatement—conviction for altering odometers—reissuance of license not prohibited

The purpose of G.S. 20-343, which prohibits the alteration of odometers, is to address a form of commercial fraud, while the promotion of highway safety is clearly the purpose of G.S. 20-28.1, which prohibits issuance of a license to a person whose license has been revoked if the person has been convicted during the revocation period of "a violation of any provision of the motor vehicle laws"; therefore, the legislative intent and policy of G.S. 20-28.1 excludes G.S. 20-343 from that class of motor vehicle laws the violation of which justifies the non-issuance of a driver's license.

Judge WHICHARD dissenting.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 26 August 1983 in Superior Court, YADKIN County. Heard in the Court of Appeals 5 June 1984.

In this civil action, plaintiff seeks to have his motor vehicle operator's license (driver's license) restored to him after having had it permanently revoked by defendant.

The essential facts of this case are adequately stated in the trial court's judgment:

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1. Plaintiff's North Carolina driver's license was permanently revoked by Defendant effective June 18, 1980 for having been convicted of three (3) or more moving violations while Plaintiff's license was suspended. Defendant's order of revocation was entered pursuant to G.S. 20-28.1.

2. Plaintiff has not been convicted of a moving violation since that date.

3. Plaintiff was convicted on October 14, 1981 in Yadkin County District Court, which conviction has become final, for seven (7) violations of G.S. 20-343 for unlawfully altering the odometers of seven (7) motor vehicles with the intent to change the numbers of miles indicated thereon in Yadkin County District Court Docket Nos. 81 Cr 4027-4033. The seven (7) violations occurred between the dates of March 31, 1981 and May 27, 1981.

...

5. On May 4, 1983, Plaintiff made application to Defendant for a probationary license pursuant to G.S. 20-28.1(c). Pursuant to the request Defendant conducted a hearing on Plaintiff's application which hearing was conducted before Hearings Officer Wayne Murdock on July 14, 1983.

6. Defendant denied Plaintiff a probationary driver's license following the above hearing holding as a matter of law that Plaintiff was not eligible for a probationary license under the provisions of G.S. 20-28.1 because Plaintiff's convictions in 1981 of violating G.S. 20-343 for altering the odometers of motor vehicles with the intent to change the number of miles indicated thereon were violations of the motor vehicle laws of North Carolina.

Upon additional inquiry by the court, defendant indicated that plaintiff would have been issued a license but for the convictions of odometer alteration, and the court so found.

Based on these findings, the trial court concluded that plaintiff's convictions were for a form of commercial fraud which, though codified under the motor vehicle laws, bore no relation to highway safety; that the legislative intent of G.S. 20-28.1 is the promotion of highway safety in the operation of motor vehicles;

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that plaintiff's convictions under G.S. 20-343 were not for violations of the motor vehicle laws within the meaning of G.S. 20-28.1(c); and that defendant was entitled to a probationary license. Accordingly, the court directed defendant to issue a probationary license to plaintiff. From this judgment, defendant appealed.

No appearance or brief for plaintiff appellee.

Attorney General Edmisten, by Deputy Attorney General Millard R. Rich, Jr., for the State.

EAGLES, Judge.

The sole issue presented by this appeal is whether the words, "any provision of the motor vehicle laws," as used in the context of G.S. 20-28.1(c) include G.S. 20-343 within their meaning. The defendant argues in effect that the legislature intended the inclusion and that, had it intended otherwise, it would have said so. We disagree.

G.S. 20-28.1(c) provides in pertinent part as follows:

[A]ny person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application, the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, alcoholic beverages laws, or drug laws of North Carolina or any other state. . . .

G.S. 20-343 provides in pertinent part as follows:

Unlawful change of mileage.—It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles indicated thereon. . . .

The purpose of G.S. 20-28.1(c) is not to punish affected drivers, that being the purpose of other provisions of the motor vehicle laws. See *Ennis v. Garrett*, 279 N.C. 612, 184 S.E. 2d 246 (1971) (statute applies only where license has been revoked). Rather, the clear purpose of G.S. 20-28.1(c) is to promote safety on

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the public highways by preventing the issuance of a driver's license to persons whose conduct, as evidenced by their conviction record, provides grounds for a reasonable belief that, if allowed to drive, they would pose a threat to that safety. A conviction of one of the so-called "moving violations," see G.S. 20-16, of this and other states also provides such grounds. Similarly, conviction of a drug or alcohol offense is an indication that the person convicted encourages drug and alcohol abuse and permits the inference that he is more likely to abuse those substances than one who has not been recently convicted of such an offense. Logic and common sense indicate that those who abuse drugs and alcohol are likely to continue their abuse when behind the wheel of a motor vehicle.

As this Court, speaking through Judge Arnold, recently said, "[l]icensed drivers are aware that driving while intoxicated threatens the safety of others." *Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E. 2d 711, *rev. den.* 311 N.C. 756, 321 S.E. 2d 134 (1984). In that case, Judge Arnold also observed,

There appears to be a growing trend in this State to maximize the punishment and deterrence which impaired drivers are subjected to. This trend is seen in the recent enactment of the "Safe Roads Act" with its stiff penalties for impaired drivers. . . . This State's growing concern and outrage stemming from injuries and deaths caused by impaired drivers is further seen in our court's recognition of a common law dram shop liability.

Id. See also *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983) (recognizing common law dram shop liability). See generally, Comment, *Punitive Damages and the Drunken Driver*, 8 *Pepperdine L. Rev.* 117 (1980).

We note that where the law directs suspension, revocation, or non-issuance of a driver's license, the grounds are convictions for "moving violations," or other statutory violations relating to highway safety, or situations where an individual's capacity to operate a motor vehicle safely are manifestly questionable. *E.g.*, G.S. 20-9, 20-13, 20-16, 20-16.1, 20-16.4, 20-17, 20-17.1, 20-23.2. We note with interest that G.S. 20-17(3) subjects a person to license revocation if convicted of "[a]ny felony in the commission of which

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a motor vehicle is used" and point out that a violation of G.S. 20-343 is a misdemeanor. G.S. 20-350.

In its argument, defendant concedes that the policy behind G.S. 20-28.1(c) is the promotion of highway safety. Defendant contends that G.S. 20-343 is a safety-related statute in that it is designed to protect consumers from a false sense of safety induced by an odometer reading that is less than the actual mileage of the car. This argument is premised on defendant's unsupported assertion that safety-related mechanical failures are more likely to occur in cars with greater mileage. To the limited extent that this may be true, we note that our statutes require periodic safety inspections of all motor vehicles. G.S. 20-183.2 *et seq.* The retail sale of an automobile by a dealer without the dealer first having the required inspection performed has been held to be negligence *per se*. *Anderson v. Robinson*, 8 N.C. App. 224, 174 S.E. 2d 45 (1970).

Our research discloses that G.S. 20-28.1 was enacted in 1965 as an additional single provision of the Uniform Driver's License Act of 1935 (G.S. 20-5 *et seq.*). N.C. Session Laws 1965, c. 286. The Vehicle Mileage Act, G.S. 20-340 *et seq.*, containing the predecessor to the current G.S. 20-343, was enacted as a separate Article under Chapter 20 in 1973. N.C. Session Laws 1973, c. 676. G.S. 20-343 was amended to its present form in 1979. N.C. Session Laws 1979, c. 696. While nothing may be conclusively inferred from this information, we think that the 1965 Legislature did not anticipate the enactment eight years later of the Vehicle Mileage Act and that the apparent inclusion of G.S. 20-343 within the compass of G.S. 20-28.1 was not intended to have the result urged by appellant.

We agree with the trial court that the purpose of G.S. 20-343 is to address a form of commercial fraud which is only indirectly related to highway safety. The promotion of highway safety is clearly the purpose of G.S. 20-28.1. Based on our reading of relevant statutory and case law, we believe that the legislative intent and policy of 20-28.1 excludes G.S. 20-343 from that class of motor vehicle laws the violation of which justifies the non-issuance of a driver's license. We therefore conclude that a violation of G.S. 20-343 is not "a violation of any provision of the motor vehicle

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laws" within the meaning of G.S. 20-28.1. Accordingly, the judgment of the trial court is

Affirmed.

Judge ARNOLD concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

G.S. 20-28.1(c) provides that a new license to drive may be issued to a person whose driving privilege has been suspended or revoked only "upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws." That G.S. 20-343 is a provision of the motor vehicle laws is beyond dispute, and that defendant was convicted of seven violations of G.S. 20-343 while his license to drive was permanently revoked is uncontroverted. The express language of G.S. 20-28.1(c) thus precludes issuance to defendant of a new license to drive.

The trial court and the majority here may be correct in their conclusion that it was not the legislative purpose and intent to proscribe issuance of a license to persons convicted of the variety of commercial fraud in question. If such was the purpose and intent, however, the General Assembly could not have said so more clearly.

The judgment below and the majority opinion here effectively repeal G.S. 20-28.1(c) *pro tanto*. Such should be the prerogative of the General Assembly, not the courts. Even in the face of considerable legitimate doubt, I would assume that the legislature meant what it plainly stated, and would leave to that branch of the government the correction of its own error, if such it is. "[I]t is quite wrong to alter the language of a statute for the purpose of getting at its meaning." *Nance v. R.R.*, 149 N.C. 366, 373, 63 S.E. 116, 119 (1908) (quoting Lord Coleridge in *Coe v. Lawrence*, 72 E.C.L. (1 Ellis & B.) 516).

I thus vote to reverse and remand to the Superior Court for issuance of an order directing the Division of Motor Vehicles to

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deny petitioner's application for a probationary license pursuant to G.S. 20-28.1(c).

ADA PEARL STONE AND CECIL GLYNN JERNIGAN, INDIVIDUALLY AND AS SHAREHOLDERS OF CREEKSIDE ENTERPRISES, INC. v. R. L. MARTIN, JR. AND LARRY G. SANDERFORD AND CREEKSIDE ENTERPRISES, INC.

No. 8310SC817

(Filed 17 July 1984)

1. Appeal and Error § 20— nonappealable interlocutory order—certiorari

The Court of Appeals has authority to issue a writ of certiorari to review a trial court order when no right of appeal from an interlocutory order exists; furthermore, grant of certiorari by another panel of the Court of Appeals was the law of the case and could not be overruled by any other panel of the Court.

2. Courts § 9.6; Rules of Civil Procedure § 37— failure to make discovery—sanctions discretionary and interlocutory—trial judge's authority to set aside

All of the G.S. 1A-1, Rule 37(b) sanctions, including striking defendants' answers, ordering them not to oppose plaintiffs' claims, and ordering a default judgment (clearly meant by the judge to be only entry of default), imposed by one trial judge for defendants' failure to comply with a discovery order were discretionary and interlocutory, leaving a second judge the right, in his discretion, to set aside the sanctions if a change of circumstances warranted such action. Findings by the trial judge that defendants had relied upon the good faith advice of counsel not to answer the discovery requests because the information was privileged, that this advice was reasonably based on then-existing case law, that appellate decisions had restricted the scope of the privilege during the course of defendants' appeal to their detriment, and that defendants were willing to comply with the discovery order since the Court of Appeals rejected their claim of privilege supported the trial court's finding that a significant change of circumstances had taken place since imposition of the sanctions.

ON certiorari to review order entered 29 November 1982 by *Farmer, Judge*, in Superior Court, WAKE County. Heard in the Court of Appeals 3 May 1984.

Plaintiffs, shareholders in defendant corporation, brought this action for compensatory damages, punitive damages, arrest and bail, and body execution of the individual defendants for their alleged malfeasance in conducting the affairs of the corporation. Plaintiffs served interrogatories and requests for admission on

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the individual defendants, who refused to answer, claiming the privilege against self-incrimination.

Defendants continued to assert their claim of privilege after Judge Preston ordered them to comply with most of the discovery requests. Judge Lee consequently imposed sanctions pursuant to G.S. 1A-1, Rule 37(b), which sanctions included striking the individual defendants' answers, ordering them not to oppose the claims in the complaint, adjudging them to be in default, and ordering a trial to determine the amount of the judgment to be entered. Defendant Martin appealed from the order imposing sanctions.

This Court affirmed that order in a decision reported at 53 N.C. App. 600, 281 S.E. 2d 402 (1981). Upon petition for rehearing, that opinion was withdrawn and superseded by an opinion reported at 56 N.C. App. 473, 285 S.E. 2d 866 (1982). The latter opinion affirmed Judge Lee's order on the ground that the information which was the subject of the discovery order would not necessarily tend to subject defendants to punitive damages and body execution and thus did not fall within the constitutional privilege against self-incrimination.

The individual defendants then moved that the trial court set aside the order of default and allow them to comply with the discovery order. Judge Farmer granted their motions; and this Court, upon plaintiffs' petition, issued a writ of certiorari allowing review of that order.

Brenton D. Adams and Woodall, McCormick & Felmet, by Edward H. McCormick, for plaintiff appellants.

Hunter, Wharton & Howell, by John V. Hunter, III, for defendant appellee R. L. Martin, Jr.

WHICHARD, Judge.

Defendant Martin asserts that plaintiffs' appeal should not be heard at this time because it is interlocutory and does not affect a substantial right. While the argument is not properly raised as a cross-assignment of error pursuant to N.C. R. App. P. 10(d), we choose to address it.

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[1, 2] This Court has authority to issue a writ of certiorari to review a trial court order "when no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a)(1). That authority was exercised by another panel of this Court with respect to the matters presented. Its grant of certiorari is the law of the case and cannot be overruled by this or any other panel of the Court of Appeals. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566-67, 299 S.E. 2d 629, 631-32, *rehearing denied*, 307 N.C. 703 (1983).

Plaintiffs contend that Judge Farmer effectively conducted appellate review, without jurisdiction to do so, when he set aside the sanctions imposed by another superior court judge. In general, one superior court judge may not modify, overrule, or change the judgment of another previously made in the same case. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972). However, a superior court "judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action." *Id.* at 502, 189 S.E. 2d at 488. Modification or change of an interlocutory order is proper where (1) the order was discretionary, and (2) there has been a change of circumstances. *Id.*; see also *Greene v. Charlotte Chemical Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E. 2d 82, 91 (1961).

The sanctions imposed by Judge Lee were in the nature of a discretionary interlocutory order. A trial judge may impose such of the sanctions enumerated in G.S. 1A-1, Rule 37(b)(2) as he determines "are just." The matter thus is within the trial court's discretion. The sanctions, which included striking defendants' answers, ordering them not to oppose plaintiffs' claims, and ordering a default judgment, were also interlocutory. Although Judge Lee ordered "a judgment of default," he clearly intended only entry of default, since he further ordered a trial on the issue of damages. Generally, there is first an interlocutory entry of default, and then a final judgment by default only after the requisites to its entry, including a jury trial on damages, have occurred. See G.S. 1A-1, Rule 55 comment. In *Pendley v. Ayers*, 45 N.C. App. 692, 263 S.E. 2d 833 (1980), as here, the trial court had ordered a default judgment and a trial on damages. This Court held: "The purported judgment entered herein was an entry of

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default. An entry of default is not a final order or a final judgment." *Id.* at 694, 263 S.E. 2d at 834.

Judge Farmer had authority to set aside the default sanction both because it was a discretionary, interlocutory order, *see Calloway, supra*, 281 N.C. at 502, 189 S.E. 2d at 488-89, and because G.S. 1A-1, Rule 55(d) specifically allows the trial court to set aside an entry of default "for good cause shown." "The determination [of whether good cause has been shown] is for the trial judge in the exercise of his sound discretion. . . ." *Pendley, supra*, 45 N.C. App. at 696, 263 S.E. 2d at 835.

The other sanctions ordered by Judge Lee merely reenforced the entry of default sanction. They too were interlocutory, since they did not conclude the action but left the damages issue still to be tried. All the sanctions imposed for defendants' failure to comply with the discovery order thus were discretionary and interlocutory, leaving Judge Farmer the right, in his discretion, to set aside the sanctions if a change of circumstances warranted such action. *Calloway, supra*.

Judge Farmer noted in his findings that defendants had relied upon the good faith advice of counsel not to answer the discovery requests because the information was privileged, and that this advice was reasonably based on then-existing case law. He also found that appellate decisions had restricted the scope of the privilege during the course of defendants' appeal, to their detriment. This finding, coupled with the fact that defendants have been willing to comply with the discovery order since this Court rejected their claim of privilege, constitutes a significant change of circumstances since Judge Lee's imposition of sanctions. Judge Farmer found and concluded that good cause was shown for setting aside the sanctions. "[T]he determination of whether good cause [to set aside an entry of default] has been shown rests within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Bailey v. Gooding*, 60 N.C. App. 459, 463, 299 S.E. 2d 267, 270, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 753 (1983). We find no abuse of discretion in Judge Farmer's order setting aside the entry of default and the other sanctions which reenforced it.

Our affirmance of the order also accords with the policy of allowing every litigant the opportunity to present his case. "In-

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asmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E. 2d 694, 698 (1980), *modified*, 302 N.C. 351, 275 S.E. 2d 833 (1981).

Plaintiffs contend the trial court erred in limiting their cross-examination of defendant Martin and his attorney concerning why defendants refused to comply with the discovery order. Plaintiffs' cross-examination, however, attempted to range beyond the scope of the hearing before Judge Farmer and to develop the merits of the case. The affidavit and testimony of defendant Martin were limited to a statement that he relied on his attorney's advice not to answer the discovery requests, which advice was grounded in the attorney's understanding of existing case law. Plaintiffs then tried to ascertain, by inquiring as to the substance and incriminating nature of communications between defendant Martin and the attorney, whether the attorney gave his advice in good faith. The information plaintiffs sought fell within the attorney-client privilege; that privilege was not waived since the cross-examination attempted to delve into matters far beyond the scope of the direct testimony and affidavits.

The trial court properly refused plaintiffs' request to have the privileged information put in the record for purposes of appellate review. Normally, excluded evidence must be placed in the record if offered, "unless it clearly appears . . . that the witness is privileged." G.S. 1A-1, Rule 43(c). "[I]f the exclusion is based upon a claim of privilege, disclosure of the answer should not be required, as it would in some sense destroy the very privilege ostensibly recognized" 1 H. Brandis, North Carolina Evidence § 26, at 96 (1982).

Affirmed.

Judges WEBB and HILL concur.

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JOHN PETE FEDORONKO AND JERRY FEDORONKO, JR., Co-EXECUTORS OF THE ESTATE OF ELSIE PETERSON FEDORONKO HARDWICK v. AMERICAN DEFENDER LIFE INSURANCE COMPANY AND FIRST CITIZENS BANK AND TRUST COMPANY

No. 835SC1009

(Filed 17 July 1984)

1. Insurance § 37.2— life insurance—suicide—sufficiency of evidence

In an action to recover the proceeds of insurance policies which defendant refused to pay on the ground that insured had committed suicide within one year of issuance of the policies, the trial court did not err in denying defendant's motions for directed verdict and judgment n.o.v., since plaintiffs denied that insured had committed suicide; the controlling evidence was largely oral testimony and circumstantial, not documentary, evidence; the position of insured's body, and the neatly folded blanket on top, were unusual for a suicide; there was no evidence that a pistol found in the room with insured was the weapon that killed her; the medical examiner believed homicide was a possible cause of death; although no charges were brought, the sheriff continued to investigate the death as a homicide for over two years; no suicide note was found; the insured's children testified that she was in good spirits when they visited her a few days before her death; and the insured's husband claimed his Fifth Amendment privilege against self-incrimination in response to questions about whether he killed his wife.

2. Constitutional Law § 74; Evidence § 34.1— silence of witness—basis for inference by factfinder

A witness's silence can provide the basis for an inference by the factfinder, even though it cannot be used as evidence from which to find him guilty.

3. Insurance § 27.1; Attorneys § 7— credit life insurance—rate of interest on proceeds held by insurer—attorney fees

Where plaintiffs' action to recover on two credit life insurance policies was determined in their favor, the trial court did not err in declining to award plaintiffs attorney fees, since no statute authorized such an award; however, the trial court did err in awarding interest of 8% pursuant to G.S. 24-1, since the rate of interest was controlled by G.S. 58-205.3(a) and should have been "not less than the then current rate of interest on death proceeds left on deposit with the insurer."

APPEAL by plaintiffs and defendant American Defender Life Insurance Company (hereinafter defendant) from *Brown, Judge*. Judgment entered 11 March 1983 in Superior Court, PENDER County. Heard in the Court of Appeals 7 June 1984.

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Plaintiffs sued defendant to recover the proceeds of two credit life insurance policies. Defendant had issued the policies to insure plaintiffs' testate, but had refused to pay the proceeds when she died. Defendant claimed the insured had committed suicide within one year of issuance of the policies, thereby barring payment of proceeds under the terms of the policies. The insured had acquired the credit life insurance policies to insure availability of funds with which to pay two loans made to her by the other defendant, First Citizens Bank and Trust Company.

First Citizens obtained a judgment for the full amount of both debts, plus fifteen percent interest from 9 July 1981 and attorney fees. Plaintiffs do not challenge on appeal the judgment in favor of First Citizens.

Upon a jury verdict that the insured did not commit suicide, the trial court also entered judgment in favor of plaintiffs and against defendant for the face amount of both credit life insurance policies, plus eight percent interest from 10 July 1981. Plaintiffs and defendant appeal from this judgment.

Moore & Biberstein, by R. V. Biberstein, Jr., for plaintiffs.

Smith, Moore, Smith, Schell & Hunter, by Ted R. Reynolds and Maria J. Mangano, for defendant American Defender Life Insurance Company.

WHICHARD, Judge.

DEFENDANT'S APPEAL

Defendant contends the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. The parties stipulated to plaintiffs' *prima facie* case; the issue thus became defendant's affirmative defense of suicide.

Defendant's motion for judgment notwithstanding the verdict must be judged by the same standard applicable to its motion for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E. 2d 897, 902-03 (1974). Since defendant had the burden of proving suicide, its motion for directed verdict should have been granted only if the credibility of its evidence was manifest as a matter of law, and if the evidence so clearly established the fact of suicide that no reasonable inferences to the contrary could be drawn.

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North Carolina National Bank v. Burnette, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979).

[1] The *Burnette* Court identified three recurrent situations where the credibility of a movant's evidence is manifest: (1) where the non-movant establishes the proponent's case by admitting the truth of the basic facts upon which the claim of the proponent rests; (2) where the controlling evidence is documentary and its authenticity is not challenged; and (3) where there are only latent doubts as to the credibility of oral testimony and the opposing party has not impeached or contradicted such testimony. *Id.* at 537-38, 256 S.E. 2d at 396. None of these situations appears in the case at bar. Plaintiffs did not admit that testator committed suicide, they denied it. The controlling evidence is largely oral testimony and circumstantial, not direct documentary evidence. Finally, the evidence is sufficiently contradictory to support an inference other than suicide. The position of the insured's body, and the neatly folded blanket on top, were unusual for a suicide. There was no evidence that a pistol found in the room with decedent was the weapon that killed her. The medical examiner believed homicide was a possible cause of death. Although no charges were brought, the sheriff continued to investigate the death as a homicide for over two years. No suicide note was found, and the insured's children testified that she was in good spirits when they visited a few days before her death.

[2] The insured's husband claimed his Fifth Amendment privilege against self-incrimination in response to questions about whether he killed his wife. His silence constituted some additional evidence counter to defendant's theory of suicide. While invocation of the Fifth Amendment may not be considered as evidence against the husband, the privilege is personal to him and is not available to defendant.

The privilege of the witness is to prevent testimony which might be used against him in a subsequent criminal suit, and not to keep out probative evidence or any inferences to be drawn from the claim of privilege which might be relevant to the issues in the matter before the court. So, while the claim of privilege may not be used against defendant [or a witness] in a subsequent criminal prosecution, an inference that his testimony would have been unfavorable to him is available to

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his opponent in a civil cause in which defendant [or a witness] pleads the privilege

98 C.J.S. *Witnesses* § 455, at 308 (1957) (footnotes omitted).

Our research has not disclosed any North Carolina cases deciding this question. A similar situation, however, was settled long ago. Where a witness refused to answer a question concerning a prior conviction, and had the right not to answer, the witness's silence could be brought to the attention of the jury in order to discredit him. *State v. Garrett*, 44 N.C. (Busb.) 357 (1853). The relevant principle to be derived is that a witness's silence can provide the basis for an inference by the factfinder, even though it cannot be used as evidence from which to find him guilty.

The aforementioned evidence for the plaintiffs tended to contradict defendant's evidence of suicide. Consequently, the trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict.

PLAINTIFFS' APPEAL

[3] Plaintiffs contend the judgment should have included both a fifteen percent rate of interest from the date of the insured's death and attorney fees. They argue that the credit life insurance policies were intended to secure the insured's debt to First Citizens in the event of her death; that defendant's refusal to pay resulted in their being subjected to a fifteen percent interest rate and attorney fees in First Citizens' action on the debt; and that the attorney fees and fifteen percent interest rate were damages within the contemplation of the parties when the insurance contract was made, since defendant should have foreseen that they would result from its breach.

North Carolina long has held that a successful litigant may not recover attorney fees, whether as costs or as an item of damages, unless such a recovery is authorized expressly by statute. *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 289, 266 S.E. 2d 812, 814 (1980). Plaintiffs have cited no statute that would allow them to recover attorney fees, and we know of none. The court thus correctly declined to award attorney fees to plaintiffs.

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Plaintiffs' contentions regarding the rate of interest and the date from which it accrued are controlled by G.S. 58-205.3(a):

Each insurer admitted to transact life insurance in this State which, without the written consent of the beneficiary, fails or refuses to pay the death proceeds or death benefits in accordance with the terms of any policy of life or accident insurance issued by it in this State within 30 days after receipt of satisfactory proof of loss because of the death, whether accidental or otherwise, of the insured shall pay interest, *at a rate not less than the then current rate of interest on death proceeds left on deposit with the insurer computed from the date of the insured's death*, on any moneys payable and unpaid after the expiration of such 30-day period.

(Emphasis supplied.) The trial court erroneously awarded the legal rate of interest of eight percent found in G.S. 24-1. The cause thus must be remanded for award of an interest rate "not less than the then current rate of interest on death proceeds left on deposit with the insurer." The interest must run from 15 May 1981, the date of the insured's death.

The result is:

In defendant's appeal, affirmed.

In plaintiffs' appeal, affirmed in part, reversed in part, and remanded.

Judges ARNOLD and EAGLES concur.

JAMES F. HUNTER v. BETTY S. HUNTER

No. 8326DC933

(Filed 17 July 1984)

Rules of Civil Procedure § 4— summons sent to place of business—no valid service of process

Plaintiff did not establish valid service of process over defendant where the affidavit of plaintiff's attorney and a "Delivery Notice Receipt" received by plaintiff's attorney showed only that the summons was forwarded to defend-

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ant's place of business, and there was no showing that defendant herself received a copy of the summons and complaint, since there was no genuine registry receipt or other evidence of delivery attached to the affidavit. G.S. 1-75.10.

APPEAL by plaintiff from *Lanning, Judge*. Judgment entered 25 April 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 5 June 1984.

On 29 January 1981 plaintiff James F. Hunter instituted a divorce action against defendant Betty S. Hunter by filing a complaint and obtaining issuance of a summons. On or about the same date plaintiff's attorney mailed a copy of the summons and complaint to defendant at her last known address, No. 2, Brittany Court, Charlotte, North Carolina, by certified mail, return receipt requested. However, the post office received a forwarding request dated 4 February 1981, requesting that all mail for defendant be forwarded to 2911 Hanson Drive. A copy of the delivery notice, dated 5 February 1981, was then left at the Hanson Drive address, notifying defendant to call for her mail. Another forwarding request, dated 6 February 1981, was then submitted to the post office by defendant, requesting that her mail be forwarded to her place of work at 505 Southern National Center, Charlotte, North Carolina. A copy of this forwarding request was received by plaintiff's attorney on 3 March 1981. The receipt indicated that the letter was in fact forwarded to the Southern National address on 7 February 1981.

Defendant subsequently came into possession of the letter through the distribution of her employer's mail. After receiving the letter, defendant contacted her attorney and was told that it had not been properly served upon her. She was further informed that she could expect to receive more papers from plaintiff. Defendant never made an appearance in the action.

On 12 March 1981 plaintiff's attorney filed an affidavit with the court in which he averred that a copy of the summons and complaint had been mailed to defendant. Attached to the affidavit was a copy of the forwarding request dated 6 February 1981, which plaintiff contended was evidence of proper service. On 16 March 1981 the Honorable L. Stanley Brown entered a judgment of divorce.

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On 20 August 1982 defendant moved to set aside the divorce judgment on the ground that it was void because there was no valid service of process. The motion was heard on 25 April 1983, and the court entered an order setting the judgment aside. From that order, plaintiff appeals.

Bill Constangy and Robert A. Karney for plaintiff appellant.

Paul B. Guthery, Jr. for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion to set aside the divorce judgment in that service of process was properly obtained. We disagree and affirm the order of the trial court.

Rule 4(j)(1)(c) of the North Carolina Rules of Civil Procedure provides that service of process may be obtained "[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee."

Furthermore, G.S. 1-75.10 states:

Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

. . . .

(4) Service by Registered or Certified Mail—In the case of service by registered or certified mail, by affidavit of the serving party averring:

- a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
- b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
- c. That the genuine receipt or other evidence of delivery is attached.

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Moreover, G.S. 1-75.11 provides:

Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by § 1-75.10. . . .

The Supreme Court of North Carolina has held that "[s]tatutes authorizing substituted service of process, service of publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity." *Hassell v. Wilson*, 301 N.C. 307, 314, 272 S.E. 2d 77, 82 (1980). In fact, this Court has held that failure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit. *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982).

In the case at bar, plaintiff attempts to support his contention that process was properly served on defendant by showing that the summons was forwarded to defendant's last known address at 505 Southern National Center, Charlotte, North Carolina and that she subsequently came into possession of the letter and admitted to having notice of the divorce proceedings. We must find, however, that plaintiff did not comply with the statute and, therefore, failed to obtain proper service over defendant.

The affidavit presented by plaintiff's attorney to the court as proof of proper service reads as follows:

Pursuant to Rule 4(j)9(b), Robert A. Karney, being duly sworn says:

1. That he is the attorney of record for the Plaintiff in the above-entitled action.

2. That on January 28, 1981, I deposited in the United States Mail, a copy of the Summons and Complaint to be sent to the Defendant, Betty S. Hunter, #2 Brittany Court, Charlotte, North Carolina, by certified mail, return receipt requested; that it was issued by the Post Office certified number 799737.

3. That on March 3, 1981, I received through the United States Mail, a copy of the Delivery Notice Receipt, showing

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the date delivered to Betty S. Hunter, the Defendant herein, that date being February 6, 1981, and bearing the signature of the Defendant, Betty S. Hunter.

4. The Delivery Notice Receipt received from the United States Post Office is evidence that Betty S. Hunter, the Defendant in this action, received a copy of the Summons and Complaint.

5. That the Delivery Notice Receipt attached hereto is a copy of the receipt of delivery.

s/ ROBERT A. KARNEY

Strictly construing the language of G.S. 1-75.10, we find that plaintiff has failed to show proof of service of process in the manner provided by the statute. We do not agree with the assertion that the "Delivery Notice Receipt" received by plaintiff's attorney stands alone as proof of valid service. The affidavit and accompanying delivery receipt show only that the summons was forwarded to defendant's place of business. There is no showing from the affidavit that defendant herself received a copy of the summons and complaint. The trial court had before it no evidence from which it could have determined that the summons was in fact delivered to defendant since there was no genuine registry receipt or "other evidence" of delivery attached to the affidavit. We, therefore, conclude that plaintiff did not establish valid service of process over defendant and affirm the order of the trial court setting aside the judgment of divorce. Recognizing the somewhat technical nature of the holding, we call attention to the importance of following statutes authorizing substituted service of process with particularity.

Plaintiff next contends that defendant did not make her motion to set aside the divorce judgment within a reasonable time, therefore precluding her from recovery. We reject this contention without further comment. We have carefully examined plaintiff's remaining assignments of error and find in them no merit.

Affirmed.

Judges WHICHARD and EAGLES concur.

Hall v. Hotel L'Europe, Inc.

DAVID S. HALL v. HOTEL L'EUROPE, INC., D/B/A HOTEL EUROPA

No. 8314SC934

(Filed 17 July 1984)

1. Evidence § 32.2; Master and Servant § 10.2— wrongful discharge—terms of employment—parol evidence admissible

In an action for wrongful discharge from employment the trial court did not err in denying defendant's motion in limine seeking to prohibit the introduction of parol evidence establishing a fixed term of employment, since the employment contract in question, as stipulated by the parties and admitted in their testimony, was partly written and partly oral in nature so that parol evidence was admissible to establish significant and essential terms; additionally, defendant effectively waived his defense of the inadmissibility of such evidence by failing to object during the trial to the admission of testimony and stipulations establishing these terms.

2. Master and Servant § 10.3— wrongful discharge—social security payment to employee—no deduction from damages

In an action to recover for damages allegedly sustained due to defendant's wrongful breach of an employment agreement, the trial court did not err in granting plaintiff's motion in limine excluding evidence of unemployment benefits received by plaintiff, since an employer may not deduct social security and annuity payments received by an employee from damages owed to that employee for wrongful discharge.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 2 June 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 June 1984.

Plaintiff instituted this suit for damages allegedly sustained due to defendant's wrongful breach of an employment agreement. In his complaint plaintiff alleged that on or about 26 June 1981, the defendant agreed to employ the plaintiff as a chef at the Windmill Restaurant for a period of not less than one year to begin on or about 9 July 1981 at a specified salary of \$25,000 per year. Additional insurance and vacation benefits were included. He further alleged that the defendant breached the agreement when the employment was terminated without just cause on or about 9 July 1981.

In answering the complaint, defendant admitted entering the employment agreement with plaintiff, but denied that the employment was for a definite, fixed duration. Defendant alleged that

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the employment was "terminable at will by either party" and denied terminating the employment without just cause.

The parties agreed that an "Employment Letter of Agreement" dated 19 June 1981 and signed by the plaintiff on 26 June 1981 was executed between them. The letter reads as follows:

This letter is to finalize the employment agreement between yourself and Hotel Europa.

Your salary will be \$25,000.00 per year (payday every second Thursday) beginning July 9, 1981. Life insurance for you in the amount of \$15,000.00, disability insurance is included, and major medical/dental is provided for you at a cost of \$7.12 per month for dental.

Vacation time will be two weeks after one year.

At trial, defendant was denied a motion in limine seeking to exclude parol testimony concerning negotiations or offers concerning a fixed term of employment. The plaintiff was granted a motion in limine to exclude evidence relating to unemployment compensation received by the plaintiff following termination of the employment. After a jury verdict for plaintiff, judgment was entered in the amount of \$20,571 plus interest.

Nye, Mitchell, Jarvis & Bugg, by John E. Bugg, for plaintiff-appellee.

Powe, Porter and Alphin, by Eugene F. Dauchert, Jr., for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in denying its motion in limine seeking to prohibit the introduction of parol evidence establishing a fixed term of employment. A motion in limine is used to exclude prejudicial matter in advance of the trial and is addressed to the trial judge's discretion. *State v. Rouf*, 296 N.C. 623, 252 S.E. 2d 720 (1979). No prejudice resulted from the trial judge's denial of the motion since the defendant retained his right to object to such evidence at trial.

Defendant contends that the motion should have been granted in order to prevent the introduction of evidence violative of

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the parol evidence rule. The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction. 2 Brandis, North Carolina Evidence, § 251, at 266 (1982). In the event that a particular writing is only a partial integration of the agreement, "it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing." *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953).

The employment contract in question here was partly written, and partly parol in nature. The parties stipulated prior to trial, as well as admitted in their testimony, that there were numerous other significant and essential terms of the plaintiff's employment agreement with the defendant which had been agreed to by the parties, but were not contained in the "Employment Letter of Agreement," the alleged final employment contract. The parol evidence rule presumes finality with respect only to the written terms in the agreement. Other significant and essential terms, the presence of which was stipulated by the parties, can be established by using parol evidence without violating the rule. Brandis, *supra*, § 253 at 272. The "Employment Letter of Agreement" did not contain a definite term for the duration of the employment, but the evidence indicated that it was negotiated between the parties for the employment to last not less than one year. Thus, the term of employment was properly established with parol evidence. Additionally, the defendant effectively waived his defense of the inadmissibility of such evidence by failing to object during the trial to the admission of testimony and stipulations establishing these other essential facts. See *Griffin v. Wheeler-Leonard & Co., Inc.*, 290 N.C. 185, 225 S.E. 2d 557 (1976), and Brandis, *supra*, § 27 at 98.

This Court decided a remarkably similar case in *Beal v. Supply Co.*, 36 N.C. App. 505, 244 S.E. 2d 463 (1978). In *Beal*, the trial court was reversed for entering a judgment notwithstanding the verdict when the judge felt that certain testimony which should have been excluded under the parol evidence rule was erroneously considered by the jury. That jury determined, on the basis of parol evidence, that an enforceable employment agreement of a fixed duration was entered between the parties. Stipulations there indicated that the written document did not constitute the

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entire agreement between the parties. The only pertinent term given in the document was a specified annual salary. Admittedly, such a provision could not establish a fixed duration of employment, but it was determined to be evidence of an intent to fix a definite duration. The admission of parol evidence that tended to prove the fixed duration was, therefore, deemed proper. *See* Annot., 93 A.L.R. 3d 659, § 4 (1979). When confronted with the same circumstance in the trial at bar, Judge McLelland rightly permitted the introduction of the parol evidence.

In light of *Beal*, we find that defendant's motion in limine was properly denied and the parol evidence concerning the fixed duration of the employment agreement was properly admitted.

[2] Defendant also contends that the trial court erred in granting the plaintiff's motion in limine excluding evidence of unemployment benefits received by the plaintiff. We find no merit in this contention. Since there is no applicable North Carolina authority, defendant relies on a "general rule" that an employer can deduct social security and annuity payments received by an employee from damages owed to that employee for wrongful discharge. This may be the case, however, we adopt the position of reliable authorities from other jurisdictions that relate directly to wrongful discharge issues and do not allow the employer to deduct such amounts from damages owed. *See* 22 Am. Jur. 2d Damages § 209, p. 293 (1965) citing *Bang v. International Sisal Co.*, 212 Minn. 135, 4 N.W. 2d 113 (1942); *Sporn v. Celebrity, Inc.*, 129 N.J. Super. 449, 324 A. 2d 71 (1974); and *Schwarze v. Solo Cup Co.*, 112 Ill. App. 3d 632, 445 N.E. 2d 872 (1983).

Finally, defendant contends that the trial court erred in denying its requested jury issues and instructions on mitigation of damages. After a careful examination of the requested jury instructions and the judge's charge to the jury, we find no merit to the contention. A close reading reveals that Judge McLelland instructed the jury on all issues submitted by defendant, at times quoting directly from the requested set of instructions.

No error.

Judges JOHNSON and EAGLES concur.

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STATE OF NORTH CAROLINA v. ISAAC WELCH, JR.

No. 8324SC1027

(Filed 17 July 1984)

1. Rape § 3— indictment—with force and arms—averment not required

There was no merit to defendant's contention that the indictment did not correctly charge him with either first or second-degree rape because the essential averment "with force and arms" did not appear on its face, since G.S. 15-144.1(a) does not require such an averment.

2. Criminal Law § 117— corroborative testimony—instructions proper

The trial court in a rape prosecution did not err in denying defendant's motion to limit the number of witnesses who corroborated the prosecuting witness's testimony, and the court's instructions regarding corroborative testimony were not prejudicial, particularly in light of the fact that defense counsel made no request for a limiting instruction with regard to prior consistent statements.

3. Criminal Law § 42.5— articles found at crime scene—connection with defendant—admissibility

The trial court in a rape prosecution did not err in admitting into evidence items found near the scene of the crime where the items were found near the tread of a tire similar to defendant's; the sheriff testified that the prosecuting witness told him she recognized two of the items as being present at the time of the crime; and other witnesses testified that they recognized one item, a cap, as belonging to defendant.

4. Kidnapping § 1.2; Rape § 5— kidnapping and rape—separate offenses

The evidence clearly showed restraint separate and independent from an alleged rape, and the trial court therefore properly denied defendant's motion to dismiss the kidnapping charge where the evidence tended to show that the prosecuting witness requested to return to her dormitory; defendant instead took her to a dirt road without her consent and stopped the car; defendant restrained the prosecuting witness by placing a chloroform soaked rag over her face; and defendant then had vaginal intercourse with her.

APPEAL by defendant from *Friday, Judge*. Judgments entered 2 April 1983 in Superior Court, MADISON County. Heard in the Court of Appeals 8 May 1984.

Defendant was indicted on charges of kidnapping and rape. Evidence for the State tends to show that on 2 September 1982 the 19-year-old prosecuting witness was a student at Mars Hill College. She received a telephone call at her dormitory around 1:00 a.m. The call was from her brother, George, who was on leave from the United States Army and was visiting defendant.

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Defendant and his wife, neighbors of the prosecuting witness's family in Mars Hill, then talked with her and told her to come over. Defendant's wife picked the prosecuting witness up at her dormitory, and the prosecuting witness then visited with her brother for approximately an hour. She could tell that the two men had been drinking.

Around 2:00 a.m. defendant agreed to drive the prosecuting witness back to her dormitory. He did not take the usual route back and suddenly stopped his automobile on a dirt road referred to as Hill Number Two. He placed a strange smelling rag over the prosecuting witness's face, and she temporarily lost consciousness. When she came to, defendant was having vaginal intercourse with her. The prosecuting witness lost consciousness again and was next aware that defendant had driven her back to the dormitory. Defendant asked her if she hated him and then proceeded to hand her a knife from the glove compartment. The prosecuting witness ran into the dormitory.

Several hours later the prosecuting witness was taken to the hospital and released. The examining physician could not determine whether she had had intercourse. About five weeks later, she was treated for a rash on her face. Her physician testified that the rash was consistent with the contact application of chloroform.

Defendant presented evidence that after the prosecuting witness visited in his home during the early morning hours of 2 September 1982, he offered to drive her back to the dormitory. Because he had been drinking and did not want to be stopped by the police, the defendant took a circuitous route. He drove to Hill Number Two and stopped his car. He then told the prosecuting witness that she was developing a bad reputation, and that it was common knowledge she was becoming a slut. The prosecuting witness became upset and ran from the car. Defendant apologized, coaxed her back to the car and returned her to the dormitory. Defendant denied sexually assaulting the prosecuting witness. Numerous witnesses then testified to defendant's good reputation.

At the close of the evidence defendant was found guilty of attempted second degree rape and second degree kidnapping. He

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was sentenced to 3 years for the rape and 9 years for kidnapping, to be served consecutively.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Gudger, Reynolds, Ganly & Stewart, by Lamar Gudger, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first assigns error to the trial court's denial of his motion to quash the bill of indictment charging him with rape. Defendant argues that the indictment does not correctly charge him with either first or second degree rape, because the essential averment "with force and arms" does not appear on its face as required by G.S. 15-144.1.

Our Supreme Court was confronted with this issue in *State v. Corbett and State v. Rhone*, 307 N.C. 169, 297 S.E. 2d 553 (1982). The Court concluded:

We do not read the statute as either *requiring* the averment or as expressing a legislative intent that the language in G.S. § 15-144.1(a) prevail over the express language in G.S. § 15-155 which states in effect that no judgment shall be stayed or reversed because of the omission of the words "with force and arms" from the indictment.

Id. at 175, 297 S.E. 2d at 558. Based on this decision, the indictment before us comports with the requirements of G.S. 15-144.1(a).

[2] Defendant next assigns error to the trial court's denial of his motion to limit the number of witnesses who corroborated the prosecuting witness's testimony. He also questions the propriety of the court's instructions regarding corroborative testimony. We find no merit to either argument. First, the trial judge did not abuse his discretionary power in allowing the corroborative testimony. *See State v. Pollock*, 50 N.C. App. 169, 273 S.E. 2d 501 (1980). Second, the instructions given were not prejudicial, since defense counsel made no request for a limiting instruction with regard to prior consistent statements. *See State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). We also note that the jury charge

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is not in the record on appeal. "It is therefore presumed that the jury was properly instructed as to the law arising upon the evidence as required by G.S. 1-180 (now G.S. 15A-1222)." *State v. Hedrick*, 289 N.C. 232, 234, 221 S.E. 2d 350, 352 (1976).

[3] During the trial the State presented into evidence, over defendant's objections, a black cap, a plastic cup holder, a bottle of Vaseline and a cigarette lighter. The Sheriff of Madison County testified that these items were found in the vicinity of Hill Number Two very near the tread of a tire similar to defendant's. On recross-examination the Sheriff testified that the prosecuting witness told him she recognized the cap and that she remembered a plastic container in the car. Other witnesses also testified that they recognized the cap as belonging to defendant. Under these circumstances, we find no merit to defendant's argument that the items were erroneously introduced. "The well established rule in a criminal case is that every object that is calculated to throw light on the supposed crime is relevant and admissible. (Citations omitted)." *Id.* at 235, 221 S.E. 2d at 352.

Defendant argues that the trial court erred in commenting on the testimony of two defense witnesses and thereby prejudiced him. We agree with the State that the court's comments were merely directed "to keep the testimony within bounds and to eliminate time consuming collateral matters and inadmissible hearsay." We find no prejudicial error.

[4] Defendant assigns error to the trial court's denial of his motion to dismiss the kidnapping charge on grounds that the alleged kidnapping was incidental to the alleged rape. The State's evidence disputes this argument. The prosecuting witness requested to return to her dormitory; but defendant first took her to a dirt road without her consent, stopped the car and restrained the prosecuting witness by placing a chloroform soaked rag over her face. He then had vaginal intercourse with her. This evidence clearly shows restraint which is separate and independent from the alleged rape.

Defendant's allegation that the trial court erred in failing to make findings in mitigation when sentencing him is disputed by G.S. 15A-1340.4(b). Since defendant was given the presumptive sentence for each offense, the trial court was not required to

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make findings in mitigation and aggravation pursuant to the foregoing statute.

We do not find it necessary to consider defendant's remaining assignments of error. They were either abandoned intentionally, or defendant failed to cite any supporting authority or properly preserve the exceptions in the record pursuant to App. RR. 28 and 10.

Defendant received a fair trial free of prejudicial error.

No error.

Judges HEDRICK and PHILLIPS concur.

THOMAS E. MILLER v. RUTH'S OF NORTH CAROLINA, INC., RUTH'S OF SOUTH CAROLINA, INC., FRANCES JUNE GRIFFIN, ROBERT GRIFFIN, B & H FOODS, INC., B & H, INC. OF CHESTER, AND MID-SOUTH BROKERAGE CO., INC.

No. 8326SC845

(Filed 17 July 1984)

1. Corporations § 18— sale of stock—subsequent wrongs alleged by shareholder—dismissal of action

The judgment in a 1976 action between the parties compensated plaintiff as if he had sold his shares in defendant corporations in 1976, before any "wrongs" were committed, and provided that plaintiff be paid interest on the sale proceeds after that time; therefore, plaintiff's first claim for relief, a shareholder's derivative action, based on events occurring after the 1976 action, and plaintiff's individual claim to compel dividends wrongfully withheld since 1977 must fail.

2. Master and Servant § 10— no definite term of employment—employment terminable at will

Because plaintiff neither alleged nor showed by affidavit that his employment was for a definite term, he was, as a matter of law, an employee at will who could be terminated at will, and summary judgment in favor of defendants on plaintiff's "wrongful termination" claim was therefore proper because plaintiff failed to come forward with a forecast of evidence to support his claim for relief.

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APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 23 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1984.

We refer to the recently filed opinion in a companion case for a complete statement of the facts concerning a 1976 action commenced by plaintiff here against all defendants here except for Mid-South Brokerage Co., Inc. *Miller v. Ruth's*, No. 8326SC847 (filed 19 June 1984). On 3 March 1982, the trial court in that case: (1) concluded as a matter of law that plaintiff's rights as a minority shareholder had been violated by defendant's acts of mismanagement and bad faith and (2) ordered that each defendant corporation purchase at their fair value plaintiff's shares in that defendant corporation. Subsequently, based on a referee's report, the trial court in that case: (1) concluded that "the date for determining the value of plaintiff's shares and damage shall be December 31, 1976" and that "as of 31 December 1976, plaintiff shall sell" his shares in defendant's corporation to the defendant corporations; (2) ordered plaintiff to deliver his shares in defendant corporations to the Clerk of Court; (3) ordered that defendant corporations pay to plaintiff a total of \$280,000.00 for his shares and a total of \$18,015.00 as damages from acts of mismanagement, together with interest from 1 January 1977; and (4) decreed that upon payment of these amounts, "all defendants shall be discharged from any obligation any of them may have to the plaintiff by reason of all issues resolved by the Court in the judgments entered in this action." We have affirmed that judgment in the above referenced companion case. *Miller, supra*.

In this case, plaintiff filed his complaint against defendants on 15 January 1982, asserting: (1) shareholder's derivative claims based on events occurring since the filing of the previous complaint in 1976; (2) plaintiff's individual claim to compel dividends wrongfully withheld since 1977; (3) plaintiff's individual wrongful termination claim based on events since the filing of the previous claim in 1976; and (4) plaintiff's individual claim for punitive damages for wrongful termination. On 16 February 1982, the trial court entered an order that defendants not be required to file responsive pleadings in this action until further order, ruling that this action involved substantially the same issues as those presented in the 1976 action, which was still pending in Mecklenburg County Superior Court. After judgment was entered in the 1976

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action, defendants here filed a motion for summary judgment which was granted on 23 March 1983. From the judgment in this action, plaintiff appeals.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Debra L. Foster, for plaintiff-appellant.

Fairley, Hamrick, Monteith & Cobb, by S. Dean Hamrick and F. Lane Williamson, for defendant-appellees.

EAGLES, Judge.

Plaintiff assigns as error the trial court's granting summary judgment for defendants. We find no error.

[1] A motion for summary judgment may be granted only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Plaintiff's shareholder derivative action and individual claim to compel dividends are, as a matter of law, barred by the judgment in the 1976 action. The judgment in the 1976 action between this plaintiff and these defendants (except Mid-South Brokerage Co., Inc.) compensated plaintiff as if he had sold his shares in 1976 "[a]s of December 31, 1976," before any "wrongs" were committed and provided that plaintiff be paid interest on the sale proceeds after that time. Therefore, plaintiff's first claim for relief in the present action, a shareholder's derivative action, based on events occurring after the 1976 action, must fail. The effect of the judgment in the 1976 action is that plaintiff was no longer a shareholder "at the time of the transaction of which he complains." Ownership of shares "at the time of the transaction of which he complains" is an essential prerequisite to maintenance of a derivative action. G.S. 55-55(a). Similarly, plaintiff's individual claim to compel dividends wrongfully withheld since 1977 must also fail because the effect of the judgment in the 1976 action is that plaintiff was not a shareholder after 31 December 1976 and not entitled to dividends after 1976. See G.S. 55-50. For the same reasons, neither of these claims against Mid-South Brokerage Co., Inc. survives, because, according to plaintiff's complaint, Mid-South was incorporated in September 1977.

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[2] Plaintiff's individual claim for compensatory and punitive damages occurring since 1976 because of his "wrongful termination" as an officer of the Ruth's companies must also fail. In North Carolina it is a settled rule of law that "employment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party." *Roberts v. Wake Forest University*, 55 N.C. App. 430, 434, 286 S.E. 2d 120, 123, *rev. denied*, 305 N.C. 586, 292 S.E. 2d 571 (1982). Because plaintiff here has neither alleged nor shown by affidavit that his employment was for a definite term, he was, as a matter of law, an employee at will who could be terminated at will. Summary judgment in favor of defendants on plaintiff's "wrongful termination" claim was therefore proper because plaintiff failed to come forward with a forecast of evidence to support his claim for relief. See *Cone v. Cone*, 50 N.C. App. 343, 274 S.E. 2d 341, *rev. denied*, 302 N.C. 629, 280 S.E. 2d 440 (1981).

Plaintiff also assigns as error the trial court's entry of the "stay order" on 16 February 1982. Enlargement of time in which to file responsive pleadings is discretionary with the trial judge and we find no abuse of that discretion here. G.S. 1A-1, Rule 6.

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

WILLIAM POOLE AND HENRY PRIDGEN v. LOCAL 305 NATIONAL POST OFFICE MAIL HANDLERS, WATCHMAN, MESSENGERS AND GROUP LEADERS DIVISION OF THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, MEREDITH T. RICHARDSON, PRESIDENT, LOCAL 305 AND HODGES HAIRSTON, TREASURER, LOCAL 305

No. 8310DC926

(Filed 17 July 1984)

1. Associations § 5— union officers—right to sue union

There was no merit to defendants' contention that plaintiffs could not maintain an action against defendant union because, as members of the union, they were essentially suing themselves, since G.S. 1-69.1 allows unincorporated associations to sue and be sued, and under this statute a union member may seek judicial relief from efforts by the union to deprive him of his legal rights.

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2. Associations § 1— union officers not employees

Plaintiff officers were not "employees" of defendant union and thus were not entitled to exemplary damages and attorney fees under G.S. 95-25.22, since plaintiffs did not rely on the union for income and were not in fact employees, but instead merely expected reimbursement from it for time lost from their actual employment as postal workers as a result of time spent on union business.

APPEAL by defendants and plaintiffs from *Cashwell, Judge*. Judgment entered 14 April 1983 in District Court, WAKE County. Heard in the Court of Appeals 5 June 1984.

Plaintiffs, members and officers of defendant union, sued the union to recover for services performed and expenses incurred on its behalf. On a theory of implied contract, the trial court ordered defendants to pay the sums plaintiffs claimed.

Defendants appeal from that order. Plaintiffs appeal from the court's conclusion that they were not "employees" of defendant union and thus were not entitled to exemplary damages and attorney fees under G.S. 95-25.22.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Melinda Lawrence and Donnel Von Noppen, III, for plaintiffs.

Sanford, Adams, McCullough & Beard, by Charles C. Meeker, for defendants.

WHICHARD, Judge.

DEFENDANTS' APPEAL

[1] Defendants first contend that plaintiffs may not maintain an action against defendant union because, as members of the union, they are essentially suing themselves. While this contention may have had validity under the common law, *see Stafford v. Wood*, 234 N.C. 622, 68 S.E. 2d 268 (1951), G.S. 1-69.1 now allows unincorporated associations such as unions to sue and be sued. Under this statute, a union member may seek judicial relief from efforts by the union to deprive him of his legal rights. *Gainey v. Brotherhood*, 252 N.C. 256, 266-67, 113 S.E. 2d 594, 602 (1960).

Defendants cite and rely on *Casualty Co. v. Griffin*, 46 N.C. App. 826, 266 S.E. 2d 18, *disc. rev. denied*, 301 N.C. 86 (1980), which held that a church, as an unincorporated association, may

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not sue one of its own members in tort. In light of the foregoing authorities, we do not find *Casualty Co.* controlling.

The individual defendants argue that if members cannot sue the union, members likewise cannot sue them as officers of the union. Having held that the union is subject to suit by plaintiffs, it follows that the individual defendants also may be sued in their official capacities.

The individual defendants further argue that plaintiffs conferred services, if at all, prior to the time the individual defendants took office, and that therefore they could not be liable, in their official capacities, to plaintiffs. The individual defendants decided not to pay plaintiffs, however, when it was their duty as union officers to do so. Their actions as officers gave rise to plaintiffs' action, and they thus properly were named as defendants.

Defendants lastly contend the court erred in finding and concluding that defendant union had a policy of reimbursing its officers for annual and sick leave lost as a result of using leave without pay to perform union duties. The finding to that effect is supported, however, by plaintiffs' testimony, by evidence of the union's practices in prior years, and by the minutes of defendant union's executive board meeting on 28 April 1977. The finding in turn supports the conclusions regarding the sums defendants owed to plaintiffs. This contention is thus without merit.

PLAINTIFFS' APPEAL

[2] Plaintiffs contend the court erred in concluding that they were not "employees" of defendant union and thus were not entitled to exemplary damages and attorney fees under G.S. 95-25.22. "[I]t is a basic rule . . . that the intent of the Legislature controls the interpretation of any statute." *Quick v. Insurance Co.*, 287 N.C. 47, 56, 213 S.E. 2d 563, 569 (1975). We do not believe the legislature intended that the term "employee," as defined in G.S. 95-25.2(4) and used in G.S. 95-25.22, cover the relationship between plaintiffs and defendant union. We thus uphold the court's conclusion.

Although defendant union listed the payments to plaintiffs as wages or salary on W2 forms, the payments actually constituted reimbursement to officers rather than wages to employees. According to union policy, plaintiffs were to be reimbursed for ex-

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penses incurred on behalf of the union; compensated for time spent on union activities at a rate equal to their rate of pay from the United States Postal Service, which was their actual employer; and paid for annual or sick leave lost as a result of taking leave without pay to perform union business. Defendant union did not hire plaintiffs as employees; instead, by reimbursing duly elected union officials for income and benefits lost from their regular employment as a result of time spent on union business, it sought to enable them to perform their union duties without economic hardship.

While a broad construction of the term "employee" accords with the purpose of the Wage and Hour Act, Article 2A of Chapter 95 of the General Statutes, the economic reality of plaintiffs' situation is that they are not employees of defendant union. They do not rely on the union for income, but merely expect reimbursement from it for time lost from their actual employment as postal workers.

In an interpretation of the term "employee" contained in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, upon which our Wage and Hour Act is based and which has the same definition of "employee," the Fifth Circuit stated that "[b]roader economic realities are determinative," and made its decision in accordance with the policy of protecting those who, as a matter of economic reality, are dependent upon the business to which they render service. *Usery v. Pilgrim Equipment Co., Inc.*, 527 F. 2d 1308, 1315, *cert. denied*, 429 U.S. 826, 50 L.Ed. 2d 89, 97 S.Ct. 82 (1976). The court stated: "It is *dependence* that indicates employee status." *Id.* at 1311. Plaintiffs were not dependent in any significant way upon defendant union. They earned their livelihood as postal workers, not by means of an implied contract for reimbursement from the union.

The trial court made findings, based on competent evidence, to the effect that plaintiffs took leave from their regular employment to perform services for defendant union in accordance with their duties as union officers. These findings support the conclusion that plaintiffs were not union employees within the meaning of the Wage and Hour Act, notwithstanding other findings that union policy prescribed payment of "officers and other employees" and that plaintiff Pridgen was appointed business agent pur-

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suant to defendant Richardson's authority "to employ such . . . assistance as necessary." The "formalistic labels, subjective intent, or a good-faith belief" of the parties does not control; rather, "[t]he determination is to be made from . . . the economic realities of the work relationship." *Bonnette v. California Health and Welfare Agency*, 525 F. Supp. 128, 135 (N.D. Cal. 1981), *aff'd*, 704 F. 2d 1465 (9th Cir. 1983). The economic realities of the work relationship here are that plaintiffs were employees of the Postal Service, not of defendant union; and that defendant union's payments to plaintiffs constituted reimbursement to officers, not wages to employees.

Affirmed.

Judges ARNOLD and EAGLES concur.

BARBARA (KITE) MILLER v. DENNIS SHERMAN KITE

No. 8328DC497

(Filed 17 July 1984)

Divorce and Alimony § 23.4— child support—father in Japan—contacts with North Carolina—in personam jurisdiction

The trial court in a child support case properly exercised in personam jurisdiction over defendant father who had never lived in N. C. but resided in Japan, since defendant's child, whom he was obliged to support, lived in this state for nine years; during that time defendant sent child support payments each month to plaintiff in N. C. and visited the child in this state numerous times; the child attended public schools and otherwise enjoyed the benefit and protection of N. C. laws for nine years; and it could be concluded from defendant's behavior that the child's presence in the state, activities, schooling and protection under N. C. laws were entirely with his consent.

APPEAL by defendant from *Styles, Judge*. Order entered 15 February 1983 in District Court, BUNCOMBE County. Heard in the Court of Appeals 14 March 1984.

In 1972 plaintiff and defendant were divorced in Illinois. Custody and support for their minor child was not raised in that proceeding, since prior thereto by a separation agreement the parties had agreed that plaintiff would have custody and defend-

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ant would pay \$300 a month for its support. Shortly after the divorce plaintiff and the child moved from Illinois to North Carolina and resided in this state continuously until this action was filed. Defendant, an officer of a multinational banking corporation, remained in Illinois until 1977, but since then has lived for varying periods in Texas, California, and Japan.

This action for child support was filed in the District Court of Buncombe County on 8 April 1982. Summons and complaint were mailed to defendant in Texas via registered mail and the post office returned the signed receipt, indicating delivery was made to defendant on 12 April 1982. Plaintiff's counsel subsequently received a letter from a Texas lawyer stating that the summons and complaint were not signed for by defendant and that defendant was no longer in the United States. Another copy of the summons and complaint was mailed in the same manner to defendant at his business address in Tokyo, Japan, and the return receipt again indicated that the mailing was properly delivered to defendant. Plaintiff's attorney then had an alias and pluries summons issued, which was sent by registered mail to defendant's Tokyo address, along with a third copy of the complaint. The return receipt again indicated delivery to defendant.

On 2 July 1982 the cause came on for hearing, but defendant did not appear and was not represented. The hearing proceeded and at the conclusion thereof, upon findings and conclusions that both the child's expenses and defendant's earnings had greatly increased since the agreement to pay \$300 a month was made, an order was entered directing defendant to pay child support in the amount of \$800 a month and attorney's fees.

On 20 October 1982, following the filing of a notice of limited appearance, defendant's attorney moved, pursuant to the provisions of Rule 60 of the N.C. Rules of Civil Procedure, to set aside the 2 July order on the ground that the court did not have personal jurisdiction over defendant. In support thereof defendant filed affidavits which tend to show that he has never resided in North Carolina, and his only contacts with this state have been various visits to see his daughter between 1973 and 1982 and the support payments sent every month during the same period. In denying defendant's motion, the court found that defendant was

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properly served with process and the court had jurisdiction over him.

Riddle, Shackelford & Hyler, by George B. Hyler, Jr., for plaintiff appellee.

Pitts, Hugenschmidt, Krause & Davis, by Sara H. Davis, for defendant appellant.

PHILLIPS, Judge.

Defendant's contention that he has not been properly served with process requires no discussion. The record shows that he was properly served three times. Thus, we proceed to the main question presented by the defendant's appeal—whether the District Court of Buncombe County has *in personam* jurisdiction over him. The first step in the two-step process required in matters of this kind, *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977), is to determine whether the exercise of personal jurisdiction over the defendant in this instance is authorized by any North Carolina statute. Our Long Arm Statute is quite comprehensive and has been construed by this Court and our Supreme Court on numerous occasions to authorize our courts to exercise jurisdiction over non-residents on the widest basis consistent within the limits of due process of law. The portions thereof pertinent to this case are as follows:

§ 1-75.4 Personal jurisdiction, grounds for generally.

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:

. . . .

- (2) Special Jurisdiction Statutes.—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

G.S. 50-13.5(c) provides:

Jurisdiction in Actions or Proceedings for Child Support and Child Custody.—

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- (1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

Quite plainly, these two statutes read together provide the statutory basis for the exercise of *in personam* jurisdiction over the defendant for the support of his minor child, which he is legally required to do under G.S. 50-13.4(b).

The second determination required is whether, under the circumstances recorded, the exercise of the statutory jurisdiction violates constitutional due process of law. As defendant correctly contends, the Supreme Court of the United States has held that a non-resident must have certain "minimum contacts" with the forum state before *in personam* jurisdiction can be exercised over him and that the exercise of such jurisdiction must not offend traditional notions of fair play and substantial justice implicit in constitutional due process. *International Shoe Company v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). Defendant's contacts with this state are as follows: For nine years his daughter, whom he is obliged to support, has lived here; during that time defendant sent payments for her support here every month and visited her here on numerous occasions; and his daughter has attended our public schools and otherwise enjoyed the benefit and protection of our laws for nine years. Since defendant provided no home for the child, formally agreed that she could live with her mother, who chose to live here, children everywhere in this country are required to attend school, and defendant had seen on numerous occasions what her situation here was, it must be concluded that the child's activities, presence, schooling and protection under our laws was entirely with his consent. Under the circumstances there is nothing unfair about adjudicating this child's needs from the defendant in our courts, and the order appealed from is affirmed.

Kulko v. California Superior Court, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690 (1978), relied upon by defendant, has no application to this case in our opinion. There the parties, residents of New York, entered into a separation agreement giving the father, who remained in New York, custody of their two children, with the understanding that they would spend the summers with the

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mother, who had moved to California. A year later the youngest child, then twelve years old, decided to live with her mother in California and two years later the oldest child, then fifteen, did likewise. The mother thereafter sued the father for their support in the California courts; but it was held that the California court had no *in personam* jurisdiction over the non-resident defendant father. That father's situation was quite different from this defendant's. The few contacts that he had with California were all imposed on him by the decisions of others. He had legal custody of the children in New York, provided a home for them there, merely acquiesced for the sake of family harmony when the children decided to go to California, and did not visit them. Under those circumstances the court was of the opinion that it would be unfair to require the defendant to answer for the children's needs in California. Under the circumstances that exist in this case, however, we think it would be unfair for the needs of the child of him to be adjudicated elsewhere than North Carolina. Certainly, defendant cannot rightfully expect such an adjudication to be made in Japan or wherever else he happens to be and can be found.

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

WILLIS GORDON MCCRIMMON v. NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY

No. 8311DC490

(Filed 17 July 1984)

Insurance § 19.1—life insurance—material misrepresentations—application signed by beneficiary—recovery barred

Where the agent of defendant filled in an application for a policy of life insurance on plaintiff's son, and plaintiff, a high school graduate who could read and write, signed the application, material misrepresentations therein were imputed to plaintiff and barred his recovery under the policy.

Judge EAGLES concurring.

Judge BECTON joins in the concurring opinion.

McCrimmon v. N. C. Mutual Life Ins. Co.

APPEAL by defendant from *Pridgen, Judge*. Judgment entered 4 March 1983 in District Court, LEE County. Heard in the Court of Appeals 14 March 1984.

This is an action on a life insurance policy. The defendant pled as an affirmative defense false statements made by the plaintiff in the application for the policy. The plaintiff testified that he was 24 years old and a high school graduate who can read and write. He testified further that he had a son by Vickie Shaw in 1978 which son was placed in an incubator and not released from the hospital until February of 1979. The doctor told him the child had suffered brain damage. Thereafter the child "would get real hot and sick." Edward Keller, an agent of the defendant, talked with him on several occasions in regard to purchasing an insurance policy on the life of his son. He told Mr. Keller of the sickness his son had suffered. Mr. Keller prepared an application for an insurance policy. The plaintiff testified that Mr. Keller "wrote or checked the answers on the application." The plaintiff did not read the application but signed it and paid all insurance premiums.

The insurance policy was issued on or about 1 May 1979 and the plaintiff's son died of pneumonia on 26 February 1981. The policy provided "'no such statement shall void this policy or be used in defense of a claim hereunder unless it is contained in the application and a copy of the application is attached to this policy when issued.'" The application was attached to the policy and it showed the plaintiff signed the application which stated his son did not have a defect or deformity and had not consulted a doctor within the last five years for any condition not set out in the application. Both these statements were false.

The court submitted to the jury the following issue:

"Were the false answers concerning the prior defects or deformities of the insured, Kelvin Shaw, inserted by the agent of the defendant, North Carolina Mutual Life Insurance Company, without the actual or implied knowledge of the applicant plaintiff, Willis Gordon McCrimmon?"

The jury answered the issue in favor of the plaintiff. The trial court entered a judgment for the plaintiff and the defendant appealed.

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Edward L. Bullard, Jr. for plaintiff appellee and cross-appellant.

Albert L. Willis for defendant appellant.

WEBB, Judge.

G.S. 58-197 provides that a person who solicits a life insurance policy upon the life of another is the agent of the company issuing the policy upon such application. The plaintiff contends that Edward Keller, the agent of the defendant, committed a fraudulent act by getting the plaintiff to sign an application with material misrepresentations and the defendant should bear the burden of Edward Keller's fraud. Our Supreme Court has held in *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. 278, 77 S.E. 2d 692 (1953), that "when it clearly appears that an insurance agent and the insured participated in a fraud by inserting false answers with respect to material facts in an application for insurance," the knowledge of the agent is not imputed to the principal. See *Jones v. Insurance Co.*, 254 N.C. 407, 119 S.E. 2d 215 (1961).

In applying this rule our Supreme Court held in *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496 (1937), that if an application for insurance containing material misrepresentations is filled in by the agent before being signed by the applicant, these are material misrepresentations of the applicant which bar recovery. We believe we are bound by *Inman* to hold that the plaintiff's action should have been dismissed. All the evidence showed that Mr. Keller filled in the application and the plaintiff signed it. The plaintiff is a high school graduate and can read and write. Under *Inman* the false statements are imputed to him. See also *Cuthbertson v. Insurance Co.*, 96 N.C. 480, 2 S.E. 258 (1887).

We do not believe *Buchanan v. Nationwide Life Ins. Co.*, 54 N.C. App. 263, 283 S.E. 2d 421 (1981), relied on by the plaintiff, governs. This Court based its ruling in that case on what it said were conflicts in the evidence as to whether the insured had seen any doctor or had been treated at any clinic other than what had been disclosed to the insurance company's agent. In this case there is no dispute that the plaintiff signed the affidavit which contained material misrepresentations. *Inman* requires that the plaintiff's action be dismissed.

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Reversed and remanded.

Judges BECTON and EAGLES concur.

Judge EAGLES concurring.

I concur because I believe that we are bound by *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496 (1937). But for *Inman*, equity would dictate that, in the absence of collusion between the insured and the selling agent, the insurance company would be estopped and would be bound by the actions of their selling agent.

Judge BECTON joins in this concurring opinion.

JOSEPH D. LATHAN v. THE ZONING BOARD OF ADJUSTMENT OF UNION
COUNTY, NORTH CAROLINA

No. 8320SC401

(Filed 17 July 1984)

**Municipal Corporations § 30.19— building replaced with larger one—enlargement
of nonconforming use proper**

Since G.S. 153A-345(c) provides that boards of adjustment may permit special exceptions to zoning regulations, and a county zoning ordinance specifically provided that an additional structure could be placed on a lot so that it would enlarge a nonconforming use, defendant acted within the authority granted to it when it allowed a landowner to construct a new building on a lot where his lumberyard was located and required him to raze the old building in which he conducted his lumber business.

APPEAL by petitioner from *Davis, Judge*. Judgment entered 22 December 1982 in Superior Court, UNION County. Heard in the Court of Appeals 7 March 1984.

This case involves the allowance of a nonconforming use of property subject to the zoning ordinance of Union County. The property involved has been the subject of a previous action. See *Lathan v. Bd. of Commissioners*, 47 N.C. App. 357, 267 S.E. 2d 30 (1980), in which this Court affirmed a judgment of the superior court holding that the property had been illegally spot zoned.

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Following the decision of this Court, Keith A. Nesbit petitioned the Union County Board of Adjustment for permission to construct a new building on his lot. Mr. Nesbit owns a lot in Union County on which a lumberyard is located. The building in which he conducts his business has become outmoded. He asked that he be allowed to construct a new building and raze his old one. At a hearing on Mr. Nesbit's petition, Wilton E. Damon, Sr., a professional real estate appraiser, testified that, in his opinion, the original structure had become so dilapidated that it significantly impaired the property value of the area. In his opinion, the relocation of the building would improve the aesthetic appeal of the area and raise property values. The Zoning Board entered an order in which it allowed the construction of a new building on the lot and required that the old one be razed.

Petitioner, an adjoining landowner, petitioned the superior court for a writ of certiorari that was allowed. After a hearing, the superior court affirmed the order of the Board of Adjustment.

Joe P. McCollum, Jr. for petitioner appellant.

Love and Milliken, by John R. Milliken, for respondent appellee.

Peter A. Foley for respondent appellee Keith A. Nesbit.

WEBB, Judge.

The petitioner contends the Board of Adjustment exceeded the power given to it by statute and by the zoning ordinance in allowing Mr. Nesbit to construct a new building on the same lot as the old building and ordering the old building to be razed. G.S. 153A-345 provides in part:

"(c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance."

The Union County Zoning Ordinance, Section 70.4 provides in part:

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“(3) Upon petition by the owner and after a public hearing, notice of which has been given, in accordance with Section 122.2(b), the Board of Adjustment may permit

. . . .

(b) additional structures to be built on the lot within which the nonconforming use can be enlarged.”

We hold that G.S. 153A-345(c), which provides that boards of adjustment may permit special exceptions to zoning regulations, authorizes the enactment of a zoning ordinance that allows a board of adjustment to make the exception which was made in this case. The Union County Zoning Ordinance specifically provides that an additional structure may be placed on a lot so it will enlarge a nonconforming use. We hold that the Zoning Board acted within the authority granted by the ordinance when it authorized the nonconforming use.

The petitioner relies on *Atkins v. Zoning Board of Adjustment*, 53 N.C. App. 723, 281 S.E. 2d 756 (1981) and *Poster Advertising Co. v. Bd. of Adjustment*, 52 N.C. App. 266, 278 S.E. 2d 321 (1981), as well as textbooks for the proposition that the courts take a narrow view as to nonconforming uses. We do not believe we should set policy as to zoning laws. It is for the General Assembly and local governments. We believe the statute and ordinance allow the nonconforming use in this case.

The petitioner argues that the Board did not make any findings of fact to support its order. The Board made the following findings:

“(a) the action authorized would not adversely affect the health or safety of persons residing or working in the neighborhood of the nonconforming use;

(b) the action authorized would not substantially impair the value of nearby properties; and

(c) no useful purpose would be served by the strict application of the provisions or requirements of this ordinance to which the use does not conform, in the case of the specific property.”

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We believe these findings are sufficiently specific so that we can determine what induced the Board to make its decision. The findings are supported by the evidence.

Affirmed.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. DARRELL MCCRIMMON

No. 8316SC1081

(Filed 17 July 1984)

Criminal Law § 102.7— jury argument—seriousness of offense—credibility of witness

In a prosecution for second-degree burglary the district attorney's jury argument regarding the seriousness of the offense was fairly responsive to the argument of defense counsel, and the argument concerning the credibility of defense witnesses was proper.

APPEAL by defendant from *Walker, Hal Hammer, Judge*. Judgment entered 1 June 1983 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 1 May 1984.

Defendant was found guilty of second degree burglary. The State's evidence tended to show that: Late on the night of 9 December 1982 the unoccupied house of Jimmy Martin was broken into and a stereo unit and two speakers, valued at approximately \$500, were stolen; one of Martin's neighbors saw defendant and Robert McInnis standing near the Martin home with a stereo system similar to the one stolen; and McInnis, who turned State's evidence, accompanied defendant to Martin's house and waited outside while defendant broke in and removed the stereo. Defendant's evidence tended to show that the night in question was spent at several other places, including a ball game and the homes of certain friends and relatives; but some of the witnesses that supported the alibi were uncertain about the times that he was at some of the places.

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Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Philip A. Diehl for defendant appellant.

PHILLIPS, Judge.

Defendant's first contention is that the trial judge erred in permitting the District Attorney to ask two leading questions of its witness Robert McInnis. One of the questions complained of was not leading—"Did you at any time tell Detective Sims any lies about what happened that night?" Though the other question was leading—"So you told him the truth from the moment you were apprehended?"—it had no prejudicial effect on defendant's trial, in our opinion, and this assignment of error is overruled.

Defendant's only other contention is that his objection to the following portions of the District Attorney's jury argument should have been sustained:

Members of the Jury, Mr. Diehl stated in his argument Darrell McCrimmon is charged with a serious offense, and I believe that all of you know that a person breaking into another person's home is committing a serious offense. And I ask each of you if someone breaks into your home in the middle of the night, would you think it was serious? If you had to go to work at 11:00 and you had to return at 12:30 or so, and find where someone had pried open your back door—

MR. DIEHL: Objection.

COURT: The jury will take its own recollection of what the evidence was. Overruled.

. . . .

Now, you can direct all your attention to the small inconsistency Mr. Diehl alluded to and you can let Mr. McCrimmon walk out of here, but I suggest to you that you will be doing a grave injustice to Mr. Martin, to Mr. Jones, and to Mr. McInnis also, a person who had enough guts to come here and testify, to admit to you his guilt, and that a person who can manipulate the system in such a way to bring relatives and friends to testify about—

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MR. DIEHL: Objection.

COURT: Overruled.

MR. CARTER CONTINUES:

—that can bring friends and relatives to testify as to exact times that I suggest to you they are not sure about. . . .

In our opinion, the first argument was fairly responsive to the argument of defense counsel and the second was within the wide bounds that our practice permits. It is proper for a District Attorney to attack the credibility of witnesses for the defendant when basis therefor exists and we see no error in the argument complained of. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976).

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM WESLEY POINDEXTER

No. 8318SC832

(Filed 7 August 1984)

1. Constitutional Law § 45—right not to testify—failure to inform pro se defendant

Although the better practice is for the trial judge to inform a *pro se* defendant of his right not to testify, failure to inform defendant in this case, if error, was harmless, since defendant was specifically identified as the assailant of the murder victim, and defendant repeatedly expressed his intent to tell his “story” and therefore most likely would not have availed himself of the privilege against self-incrimination.

2. Constitutional Law § 46—appointed counsel—reluctance to pursue self-defense—counsel discharged by defendant

There was no merit to defendant's contention that he was compelled by the trial judge to choose between representation by appointed counsel and presenting evidence on his claim of self-defense, since, throughout the pretrial inquiry, defendant remained adamant in his determination to discharge the appointed counsel and to proceed *pro se*; counsel's reluctance to pursue the line of defense demanded by defendant was not unreasonable in light of the

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evidence that the victim was unarmed, defendant carried a sawed-off shotgun, and defendant chased the fleeing victim several blocks before shooting him twice; and defendant's decision to dismiss appointed counsel unless he pursued defendant's claim of self-defense was made by defendant without coercion or pressure from the trial court.

3. Constitutional Law § 48— no substitute counsel—appearance pro se and by counsel simultaneously not permitted

There was no merit to defendant's contention that the trial court should either have appointed substitute counsel or instructed appointed counsel to prepare to try the case and to call witnesses as requested by defendant, since defendant was not entitled to substitute counsel unless representation by counsel originally appointed would amount to a denial of defendant's right to effective assistance of counsel; defendant and appointed counsel in this case disagreed over tactics, but such disagreement generally does not render the assistance of the original counsel ineffective; counsel is in charge of and has the responsibility for the conduct of the trial, including the selection of the witnesses to be called; and defendant, in claiming the right to select witnesses, implied that he should have been allowed to act as co-counsel, but he had no right to appear *pro se* and by counsel simultaneously.

4. Constitutional Law § 31— indigent defendant—no right to state paid investigator

The trial court in a second-degree murder case did not err in denying defendant's request for a state paid investigator, since defendant wanted an investigator for the sole purpose of obtaining hospital documents; records of defendant's emergency room visit which occurred two weeks prior to the killing would not have added materially to defendant's claim of self-defense; and there was no evidence that the records were necessary for defendant to receive a fair trial.

5. Constitutional Law § 68— presence of witnesses—no obligation of court to subpoena

There was no merit to defendant's contention that the trial court failed to assist him in locating and subpoenaing his witnesses, since defendant had ample opportunity prior to trial to subpoena his witnesses or make the necessary motions and applications to secure the presence of any unwilling or confined witnesses and he failed to do so.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 24 February 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 February 1984.

Defendant was tried and found guilty of murder in the second degree of Larry Richmond. From his conviction and sentence, defendant appeals.

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Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender, Malcolm R. Hunter, Jr., for the defendant appellant.

JOHNSON, Judge.

On 16 February 1983, defendant filed a *pro se* motion to discharge the public defender appointed to represent him. In support of his motion, defendant stated that: (1) he was dissatisfied with the appointed counsel; (2) the appointed counsel had neglected defendant's case; (3) the appointed counsel had repeatedly refused to handle the case in defendant's best interest; and (4) the appointed counsel acted in concert with the State's interest. When defendant's case was called for trial on 23 February 1983, the trial judge conducted a hearing on defendant's *pro se* motion to discharge his court appointed counsel. After the trial court had made a thorough inquiry and was satisfied that defendant (1) had been clearly advised of his right to the assistance of counsel, (2) understood and could appreciate the consequences of his decision to represent himself, and (3) was able to comprehend the nature of the charge and the proceedings and range of permissible punishment. Accordingly, the trial court granted defendant's motion to dismiss appointed counsel. Defendant was allowed to proceed to trial *pro se*. However, the court appointed the discharged counsel to remain as standby counsel.

At trial, the evidence tended to show that defendant had known the victim for several months and they had been involved in various drug deals together. Defendant, after learning that the victim was a police informant, discontinued his drug dealings with the victim. In the meantime, several incidents occurred wherein the victim pistol whipped defendant's roommate and threatened another of defendant's friends. On the afternoon of 22 December 1978, the victim went to defendant's apartment where he insisted that defendant leave town. They argued and the victim shot a hole in the roof of the defendant's apartment. A few hours later, defendant went to the victim's home where they again argued. The victim and a friend visiting with him fled from the home into the street. Defendant pursued the victim into the street where

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the killing occurred. Defendant admitted the killing but testified that he acted in self-defense.

The jury returned a verdict of guilty and defendant was given an active prison sentence.

The defendant brings forward four assignments of error relating to *pro se* representation. We have reviewed each of these assignments and find no reversible error.

[1] Defendant in his first assignment of error contends that the trial court erred in failing to advise him of his right not to testify. He argues that the court should have informed him that he had a right not to testify and that his decision not to testify could not be used as an inference of guilt. The record discloses that the trial court did not specifically inform defendant of his fifth amendment privilege against self-incrimination. The record does indicate, however, that defendant was not coerced or pressured to testify.

The fifth amendment privilege, belatedly claimed by defendant, says no more than a person shall not be *compelled* to speak. It does not place upon the trial court the duty of informing a *pro se* defendant of his rights and privileges. In fact, the courts in this State have held that a defendant who knowingly and intelligently elects to proceed *pro se*, "cannot expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant." *State v. Lashley*, 21 N.C. App. 83, 85, 203 S.E. 2d 71, 72 (1974); *State v. McDougald*, 18 N.C. App. 407, 410, 197 S.E. 2d 11, 13, *cert. denied*, 283 N.C. 756, 198 S.E. 2d 726 (1973). Moreover, our courts have ruled that a defendant who chooses to proceed *pro se* "does so at his peril and acquires as a matter of right no greater privilege or latitude than would an attorney acting for him." *State v. Cronin*, 299 N.C. 229, 244-245, 262 S.E. 2d 277, 287 (1980); *State v. Lashley, supra*, at 85, 203 S.E. 2d at 72. *See also* Note, Right to Defend *Pro Se*, 48 N.C. Law Rev. 678, 683-684 (1970).

Assuming, *arguendo*, that the court had a duty to inform the *pro se* defendant of his fifth amendment privilege against self-incrimination, we find no evidence that the court's failure to so advise defendant affected the outcome of the trial. Therefore, any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705, 710-711,

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reh. denied, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed. 2d 241 (1967). Several witnesses for the State identified defendant as the assailant. One witness identified defendant as the individual who chased the victim with a shotgun. Another witness observed defendant and the victim at the scene of the shooting. Still another witness testified that the victim's fatal wounds were caused by shotgun blasts. Other State's witnesses observed circumstances corroborative of the shooting.

Furthermore, there is every reason to believe that defendant would not have availed himself of the privilege against self-incrimination. In response to the trial court's statement that he would be subjected to cross-examination if he should testify, defendant stated:

Your honor, that doesn't matter. What I'm saying is I will have a chance to tell my story. . . .

Throughout the pretrial inquiry and the trial itself, defendant repeatedly expressed his intent to tell his "story."

We conclude that although clearly the better practice in such cases would be for the trial judge to inform a *pro se* defendant of his fifth amendment privilege, failure to specifically inform the defendant in the present case was, if error, harmless.

[2] In his next assignment of error, defendant contends that the court erred "by making the defendant give up assistance of counsel as the cost for presenting evidence in his defense." He argues that he was compelled by the trial judge to choose between representation by appointed counsel and presenting evidence on his claim of self-defense. The record belies this contention.

The record is replete with evidence of defendant's insistence that the appointed counsel be removed from the case. Several days prior to trial, defendant filed two documents in which he asserted his desire to discharge his appointed attorney. At the pretrial inquiry, defendant repeatedly and unequivocally demanded that the appointed attorney be relieved and that he be allowed to proceed *pro se*. Portions of the colloquy between defendant and the court are as follows:

The Court: We have certain rules of evidence that are very technical. It takes somebody with

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training to know how to object to certain evidence to protect a defendant's rights. Mr. Lind is very capable of doing that.

Mr. Poindexter: I don't want him.

The Court: And you have the right to have Mr. Lind represent you if you want. And, of course, you have the right to represent yourself.

Mr. Poindexter: I don't want Mr. Lind.

Throughout the pretrial inquiry, defendant remained adamant in his determination to discharge the appointed counsel and to proceed *pro se*. He never wavered from this position. Since counsel cannot be imposed on a defendant, the trial court had no alternative but to grant defendant's motion to dismiss his counsel. *Faretta v. California*, 422 U.S. 806, 820, 95 S.Ct. 2525, 2533, 45 L.Ed. 2d 562, 573 (1975); *State v. Gerald*, 304 N.C. 511, 516, 284 S.E. 2d 312, 316 (1981); *State v. McNeil*, 263 N.C. 260, 267-268, 139 S.E. 2d 667, 672 (1965).

Defendant's insistence on presenting evidence which he believed would establish the defense of self-defense was contrary to the trial strategy proposed by appointed counsel. The trial counsel had decided to proceed by challenging the sufficiency of the State's identification evidence. Proffering a defense of self-defense, which necessarily requires defendant to admit the crime, would have removed this option. Although the evidence adduced at trial tended to show that the victim was a violent man and had threatened defendant on the day of the killing, there was uncontroverted evidence that defendant voluntarily went to the victim's home where the affray ensued. The defendant's own evidence revealed that at no time during the incident did defendant attempt to retreat. In fact, when the victim fled from his home, defendant was in hot pursuit and the killing took place several blocks away from the place where the incident began.

Self-defense requires, in part, a showing that the defendant did not use excessive force and that the defendant was not the aggressor. *State v. Norris*, 303 N.C. 526, 530, 279 S.E. 2d 570, 572 (1981). In the case at bar, the evidence tended to show that: the victim was unarmed; defendant carried a sawed-off shotgun; and defendant chased the fleeing victim several blocks before shoot-

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ing him twice. Based on these facts, counsel's reluctance to pursue the line of defense demanded by the defendant was not unreasonable. In sum, the record shows that defendant's decision to dismiss the appointed counsel unless he pursued defendant's claim of self-defense was made by defendant without coercion or pressure from the trial court.

[3] Defendant also contends that the trial court should have either appointed substitute counsel or instructed appointed counsel to prepare to try the case to call the witnesses as requested by defendant. The principles applicable to criminal prosecutions are well settled. An indigent defendant is entitled to appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). He is not, however, entitled to substitute counsel unless representation by counsel originally appointed would amount to a denial of defendant's right to effective assistance of counsel. *State v. Thacker*, 301 N.C. 348, 352, 271 S.E. 2d 252, 255 (1980); *United States v. Young*, 482 F. 2d 993 (5th Cir. 1973).

The court's lengthy inquiry into defendant's complaints against appointed counsel disclosed that defendant's dissatisfaction centered around counsel's decision to pursue a line of defense contrary to defendant's wishes. It is well recognized that trial counsel's decision to pursue a particular defense is a tactical one based on his professional judgment. A disagreement over tactics generally does not render the assistance of the original counsel ineffective. *State v. Hutchins*, 303 N.C. 321, 355, 279 S.E. 2d 788, 797 (1981); *State v. Robinson*, 290 N.C. 56, 66, 224 S.E. 2d 174, 179 (1976).

Defendant also argues that the court should have required appointed counsel to try the case and allow the defendant to present the witnesses that defendant wished to have testify on his behalf.

While counsel, whether retained or appointed, should be solicitous of defendant's concerns and willing to accommodate defendant in doing such things as defendant feels are in defendant's best interest, counsel is not the "mere lackey or 'mouth-piece' of his client." *State v. Robinson, supra*, at 66, 224 S.E. 2d at 179. Counsel is in charge of and has the responsibility for the conduct of the trial, including the selection of the witnesses to be

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called. *Id.* As counsel, he is required to present evidence which in his professional judgment will effectuate his client's interest. Clearly, counsel should not be required to conduct a trial in a manner in which he believes, based on the facts and circumstances of the case, to be harmful and unreasonable. Defendant, by his argument, also implies that he should have been allowed to act as co-counsel with appointed counsel. While defendant had a right to counsel and a right to appear *pro se*, he had no right to appear *pro se* and by counsel, simultaneously. G.S. 1-11; G.S. 15A-1242; *State v. Parton*, 303 N.C. 55, 61, 277 S.E. 2d 410, 415 (1981); *State v. Phillip*, 261 N.C. 263, 268, 134 S.E. 2d 386, 391, *cert. denied*, 377 U.S. 1003, 84 S.Ct. 1939, 12 L.Ed. 2d 1052, *reh'g denied*, 379 U.S. 874, 85 S.Ct. 28, 13 L.Ed. 2d 83 (1964). Therefore, we hold that this assignment of error is without merit.

Defendant, by his final assignments of error, contends that the court erred in denying his request for a publicly paid investigator and in failing to assist him in having his witnesses subpoenaed. He argues, first, that the information that would have been collected by the investigator was relevant to his claim of self-defense. G.S. 7A-450(b), in pertinent part, provides:

Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and *other necessary expenses of representations.* (Emphasis added.)

In conformity with this statute, our courts have consistently held that an indigent is entitled to a state paid expert or investigator when it is necessary to insure effective preparation of a defense. *See, e.g., State v. Watson*, 310 N.C. 384, 390, 312 S.E. 2d 448, 453 (1984); *State v. Tatum*, 291 N.C. 73, 82, 229 S.E. 2d 562, 566-567 (1976). However, such assistance is not constitutionally mandated. *State v. Watson, supra*, at 390, 312 S.E. 2d at 453. Whether the assistance is necessary depends upon the facts and circumstances of each case and is a question properly left within the sound discretion of the trial judge. *State v. Tatum, supra*, at 82, 229 S.E. 2d at 567-568.

In *Watson*, our Supreme Court has stated that "[t]he applicable rule is that expert assistance need only be provided by the state when the defendant can show it is probable that he will

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not receive a fair trial without the requested assistance, or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense." 310 N.C. at 390, 312 S.E. 2d at 453.

[4] Applying this rule to the case at bar, the record reveals that defendant wanted an investigator for the sole purpose of obtaining hospital documents. According to defendant, the hospital records would show that due to his fear of the victim, defendant was admitted to the emergency room of a local hospital for "nerves." Records of the emergency room visit, which occurred approximately two weeks prior to the killing, would not have, in our view, added materially to defendant's claim of self-defense. Nor is there any evidence that the hospital records were necessary for defendant to receive a fair trial. Thus, we find that the court did not abuse its discretion in denying defendant's request for a state paid investigator. Hence, this assignment of error is without merit.

[5] Defendant next argues that the court failed to assist him in locating and subpoenaing his witnesses. In pursuit of this contention, defendant argues that the court should have insured the presence of his witnesses. He argues, further, that G.S. 15A-803 and G.S. 15A-823 give the court the authority to secure the presence of his witnesses who are unwilling or who are confined.

Proceedings to secure the attendance of unwilling witnesses are governed by G.S. 15A-803, which provides in pertinent part:

(a) Material Witness Order Authorized—A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding. . . .

. . . .

(d) Procedure—A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance. . . .

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The presence of a witness confined in a federal institution can be secured under G.S. 15A-823, which provides in part:

(a) When

. . . .

(2) There is a reasonable cause to believe that a person confined in a federal prison or other federal custody, . . . possesses information material to such criminal proceeding;

. . . .

(b) The certificate may be issued upon application of either the State or a defendant

Our review of the record discloses that defendant did not avail himself of any of these means to secure the attendance of his witnesses. The record clearly shows that defendant had ample opportunity prior to trial to subpoena his witnesses or to make the necessary motions and applications to secure the presence of any unwilling or confined witnesses. The record reveals that defendant came on for trial approximately six months after counsel was appointed. At no time during this period did he inform the court or his appointed counsel of the names and location of his prospective witnesses. In fact, defendant did not request assistance in obtaining subpoenas for his witnesses until after the close of the State's case in-chief.

Even if we were to construe this request as a motion and application under G.S. 15A-803 and G.S. 15A-823, we find that the requirements of these statutes were not met. To obtain a material witness order or certificate known as a writ of habeas corpus ad testificandum, a party must show to the court that the prospective witness has information material to the determination of the proceeding. Although the evidence tended to show that the prospective witnesses were aware of the previous altercations between defendant and the victim, there is no evidence in the record that these witnesses had knowledge of the events immediately surrounding the killing. Therefore, we believe that the testimony of the prospective witnesses was not material to these proceedings. Moreover, we believe that defendant's own lack of diligence is responsible for the absence of his witnesses. *State v. Wells*, 290 N.C. 485, 491-492, 226 S.E. 2d 325, 330 (1976). Under

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circumstances such as these, our Supreme Court has ruled that an accused "may not place the burden on officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense." *State v. Tindall*, 294 N.C. 689, 700, 242 S.E. 2d 806, 813 (1978). Notwithstanding defendant's eleventh hour request, the trial court, by directing police officers to locate defendant's witnesses, made every reasonable effort to assist defendant. Accordingly, this assignment of error is without merit.

In defendant's trial we find

No error.

Chief Judge VAUGHN and Judge WEBB concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA v.
JOHN ALEXANDER GOODEN AND WARD LUMBER COMPANY

No. 8313DC781

(Filed 7 August 1984)

**1. Appeal and Error § 14; Rules of Civil Procedure § 13— finding of contempt—
notice of appeal—subsequent dismissal of counterclaim not appealed**

In a civil contempt proceeding in which respondent lumber company was found to be in civil contempt for failure to submit to an administrative inspection warrant issued by the court, judgment was entered on 18 February 1983, and respondent's oral notice of appeal given at that time did not encompass the court's subsequent order, which dismissed respondent's counterclaim, entered on 18 May 1983, *nunc pro tunc* to 14 March 1983; moreover, an intent to appeal the dismissal of the counterclaim could not be inferred from respondent's oral notice of appeal from the contempt judgment, since the judgment appealed from was limited to the issue of contempt and did not dispose of the counterclaim; a counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim; and the issues raised in the counterclaim, which by respondent's own admission were important constitutional issues, were not so intertwined with the narrow issues involved in the civil contempt proceeding that an appeal taken from judgment in one was notice of intent to appeal from a subsequent ruling in the other.

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2. Courts § 14.1— contempt proceeding in district court—no grounds for transfer to superior court

In a civil contempt proceeding in which respondent lumber company was found to be in civil contempt for failure to submit to an administrative inspection warrant issued by the court, the superior court was not the proper division for consideration of this action and there were no grounds for transfer from the district to the superior court, since G.S. 7A-245(b) provides that, when a case is otherwise properly in the district court, a prayer for injunctive or declaratory relief by any party not a plaintiff on grounds stated in the statute is not ground for transfer; the relief asserted by respondents as grounds for the transfer was sought in a counterclaim; and a respondent's status in a contempt proceeding is comparable to that of a defendant in a civil action.

3. Contempt of Court § 6.2— refusal to submit to inspection warrant—lumber company in contempt

The trial court did not err in finding respondent lumber company in civil contempt of court where the evidence supported the court's findings that respondent willfully refused to submit to an administrative inspection warrant issued by the court and that respondent had shown no legal cause for that refusal.

Chief Judge VAUGHN concurring.

APPEAL by respondent Ward Lumber Company from *Gore, Judge*. Judgment entered 18 February 1983 in District Court, BLADEN County. Heard in the Court of Appeals 2 May 1984.

This is a civil proceeding in which respondent Ward Lumber Company (hereinafter Ward) was found to be in civil contempt for failure to submit to an administrative inspection warrant issued by the court. The warrant authorized James L. Wright, a Safety Officer with the Office of Occupational Safety and Health of the North Carolina Department of Labor (hereinafter OSH), to conduct a safety and health inspection of Ward's business premises.

Events leading up to the initiation of this special proceeding may be summarized as follows: On 4 January 1983, Mr. Wright and an OSH Supervisor attempted without a warrant to conduct a safety and health inspection of defendant's business premises. The inspection was a "general schedule" inspection, that is, an inspection of a randomly selected site where selection is not based on any specific complaint and the inspection covers the entire business premises. Entry onto the premises was refused by respondent John Alexander Gooden, president of Ward, and his brother, Ronald Gooden. On 5 January 1983, OSH Safety Officer

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Wright obtained from District Court Judge William Wood an administrative inspection warrant to conduct an inspection of Ward's premises. The OSH application for the warrant was made *ex parte* and without notice to respondents. The warrant authorized the same type of general schedule inspection that the OSH officers had attempted to conduct the day before without a warrant. Upon presentation of the warrant at Ward Lumber Company, entry onto the premises was again refused by Ronald Gooden.

On 19 January 1983, petitioner initiated this contempt proceeding in District Court. The petition alleged, *inter alia*, that entry onto Ward's premises had been refused by John Gooden on the basis that the administrative inspection warrant was unconstitutional. The petition asked that respondents be ordered by the court to appear and show cause why they should not be held in contempt for refusing to honor the administrative inspection warrant. The petition also asked the court to specify that respondents could purge themselves of contempt by submitting to inspection by OSH.

On 19 January 1983, after finding probable cause for the issuance of a contempt order, the court directed respondents to appear and show cause why the order should not issue. The show cause hearing was originally set for 2 February 1983 and was continued by consent of the parties until 18 February 1983.

On 31 January 1983, respondents filed a motion to transfer the proceeding to Superior Court, an answer and counterclaim, and a subpoena *duces tecum*. In their answer and counterclaim to OSH's petition, respondents claimed that the inspection warrant was invalid because (1) it violated the fourth amendment protection against unreasonable searches and seizures; (2) it violated respondents' fifth amendment due process rights; and (3) it was not issued in compliance with OSH's own administrative procedures or applicable federal regulations. These alleged procedural violations were asserted as the basis for respondents' refusal to submit to the warrant. Respondents counterclaimed on the basis of the alleged constitutional violations seeking (1) to have the warrant declared null and void; (2) to have OSH's inspection plan declared invalid and unconstitutional; (3) to quash the inspection

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warrant; and (4) to enjoin petitioner from making future inspections without a valid warrant.

Respondents' motion to transfer the contempt proceeding to Superior Court was based on the nature and asserted importance of the constitutional issues raised in their answer and counterclaim. The subpoena *duces tecum* had been issued on 28 January 1983 by respondents' attorney to require Safety Officer Wright to appear for a deposition and bring certain documents and records with him. The deposition, scheduled for 23 February 1983, was requested apparently in order to obtain testimony for use in the pending civil contempt proceeding.

On 3 February 1983, OSH moved to quash the subpoena *duces tecum* arguing, *inter alia*, that discovery is not permitted in proceedings for civil contempt. OSH also moved to dismiss respondents' motion to transfer the proceeding to Superior Court on the grounds that a case otherwise properly in district court may not be transferred on the basis that a party other than the plaintiff requests declaratory relief. OSH further contended that the law governing civil contempt proceedings does not provide for an answer or counterclaim by the respondents.

On 14 February 1983, respondents filed a motion to stay the district court proceedings pending a ruling by the superior court on their motion to transfer. On 18 February 1983, the day of the show cause hearing, respondents replied to OSH's contention that the answer and counterclaim were not proper in proceedings for civil contempt, asserting on the basis of several recent federal decisions that the Rules of Civil Procedure permitted the filing of an answer and counterclaim by respondents in civil contempt proceedings.

The show cause hearing occurred as scheduled in District Court. At the outset, the court denied respondents' motion to stay the District Court proceedings and denied as well their oral motion for a continuance. Respondents presented no evidence or testimony. Judgment was announced in open court. The court found facts essentially as stated above and concluded that respondent Ward had wilfully and without legal excuse failed to comply with the inspection warrant. Ward was fined \$100.00 and ordered to comply with all lawful inspection warrants. The court concluded that the purpose of the contested warrant could still be

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served by permitting the inspection. From the entry of this order in open court, respondent Ward appealed. A written order in conformity with this judgment and noting respondents' oral notice of appeal was entered on 14 March 1983. In pertinent part, that order is as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Respondent Ward Lumber Company is to abide by all lawful Administrative Inspection Warrants issued by a Judicial Official, and that further, Ward Lumber Company be assessed a fine of \$100,000 [sic] for its failure to comply with the Administrative Inspection Warrant issued by Judge Wood.

The Respondents Ward Lumber Company and John Alexander Gooden except to the entry of this Order and give Notice of Appeal to the Court of Appeals; all sanctions imposed by this Court are stayed until such time as the Court of Appeals rules on this matter. . . .

Petitioner's motion to quash the subpoena issued in this matter by the Respondents is allowed.

Attorney General Edmisten, by Assistant Attorney General Tiare B. Smiley, for petitioner-appellee.

McCarty, Wilson, Rader and Mash, by Robert E. Rader, Jr., pro hac vice; Saccomanno, Clegg, Martin and Kipple, by Lynn L. Laughlin; and Hester, Hester and Johnson, by W. Leslie Johnson, Jr., for respondent-appellant Ward Lumber Company.

EAGLES, Judge.

Respondent Ward contends that "[t]his case poses simple but profoundly important constitutional questions." We note, however, that jurisdictional restrictions limit our consideration to the issues of whether respondents' motions to stay the district court proceedings and for a continuance were properly denied and whether the trial court correctly found respondent in civil contempt for failure to comply with the administrative inspection warrant.

I

The record on appeal and the transcript of the show cause hearing affirmatively disclose that appeal was taken only from

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the trial court's judgment finding respondent Ward Lumber Company in contempt, announced in open court. The notice of appeal from the judgment, given orally in open court, is the only notice of appeal that appears in the record or transcript.

a.

From the record, it appears that the trial court entered a written order on 18 May 1983, *nunc pro tunc* to 14 March 1983, dismissing respondents' counterclaim. It is in their counterclaim that respondents raised the issues of constitutionality. In the same written order, the court denied respondents' "Motion for Reconsideration," which does not appear in the record. This order, even though entered *nunc pro tunc* to 14 March 1983, nevertheless was entered out of session, which required respondent Ward to give notice of appeal in accordance with Appellate Rule 3(b). Rule 3(b) requires that appeals from judgments or orders rendered out of session must be taken by filing written notice of appeal with the clerk of superior court with service upon all parties. Rule 3(c) requires that the written notice must be given within ten days of the entry of the contested judgment or order. Rule 3(d) requires that the written notice "shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record." G.S. 1-279 prescribes the procedure for taking an appeal in essentially the same manner and language. See *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E. 2d 46 (1976). For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed sub nom.*, *Moore v. Guilford County*, 459 U.S. 1139, 74 L.Ed. 2d 987 (1983); G.S. 1A-1, Rule 58.

Appeal from a judgment may also be taken by "giving oral notice of appeal at trial," App. R. 3(a)(1); G.S. 1-279(a)(1), but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. See *McCall v. Kendrick*, 2 Utah 2d 364, 274 P. 2d 962 (1954) (appeal taken from

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judgment does not apply to subsequent award of attorney fees). See generally, 4A C.J.S. *Appeal and Review* §§ 576, 593(3), 594(4); N.C. App. R. 3, commentary (N.C. Rules of Court, 1984).

b.

[1] With the above principles in mind, we hold that judgment in this case was entered on 18 February 1983 and that Ward's oral notice of appeal given at that time simply does not encompass the subsequent order dismissing the counterclaim, entered nearly three months later. This defect is not cured either by the entry of that order *nunc pro tunc* to 14 March 1983, the date on which the written judgment was entered, or by the court's order, entered 18 April 1983, setting 14 March 1983 as the date from which the time for preparing the record on appeal was to run.

We cannot infer from Ward's oral notice of appeal from the contempt judgment an intent to appeal the dismissal of the counterclaim. See *Smith v. Insurance Co.*, 43 N.C. App. 269, 258 S.E. 2d 864 (1979) (liberal construction of rules governing *written* notice of appeal). First, the judgment appealed from was limited to the issue of contempt and did not dispose of the counterclaim; second, a counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim, see G.S. 1A-1, Rule 13; third, the issues raised in the counterclaim, which by Ward's own admission are important constitutional issues, are not so intertwined with the narrow issues involved in the civil contempt proceeding that an appeal taken from judgment in one is notice of intent to appeal from a subsequent ruling in the other. See generally, 9 Moore's Federal Practice, § 203.18 (2d ed. 1983). Ward's unsupported assertion that the court's judgment of contempt *ipso facto* disposed of the counterclaim and related discovery requests is incorrect and overlooks the significance of failing to take an appeal in compliance with applicable rules and statutes. Without proper notice of appeal, this Court acquires no jurisdiction. *Oliver v. Williams*, 266 N.C. 601, 146 S.E. 2d 648 (1966); *Smith v. Smith*, 43 N.C. App. 338, 258 S.E. 2d 833 (1979), *rev. denied*, 299 N.C. 122, 262 S.E. 2d 6 (1980); *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). Accordingly, we must dismiss Ward's purported appeal from the dismissal of the counterclaim for lack of

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jurisdiction. *Id.* Our consideration of the constitutional issues sought to be raised is foreclosed.

II

Ward assigns as error the court's denial of its request for discovery which, we assume, refers to the court's quashing of respondents' subpoena *duces tecum*. However, respondent Ward failed to note an exception in the record. Further, respondents failed to object to the ruling at trial although it came after oral notice of appeal was given. Even if we assume then that the oral notice of appeal encompasses the quashing of the subpoena *duces tecum*, Ward's failure to note an exception in the record or transcript precludes our consideration of the assignment of error and related argument. *State v. Kidd*, 60 N.C. App. 140, 298 S.E. 2d 406 (1982), *rev. denied*, 307 N.C. 700, 301 S.E. 2d 393 (1983).

III

[2] In a matter that is properly before us, respondent Ward contends that the district court erred in refusing to stay its proceedings, thereby not allowing the superior court to consider the requested transfer. A few hours before filing their counterclaim, respondents filed a motion to transfer the entire controversy to superior court on the basis that the counterclaim requested relief of a nature that conferred jurisdiction on the superior court. G.S. 7A-245 provides that the superior court is the proper division for trial of civil actions where, as in the counterclaim, the principal relief requested is:

- (1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;
- (2) . . .
- (3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or
- (4) The enforcement or declaration of any claim of constitutional right.

However, G.S. 7A-245(b) provides:

When a case is otherwise properly in the district court division, a prayer for injunctive or declaratory relief by any

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party not a plaintiff on grounds stated in this section is not ground for transfer.

Since the relief asserted by respondents as grounds for the transfer was sought in a counterclaim and since a respondent's status in a contempt proceeding is comparable to that of a defendant in a civil action, under G.S. 7A-245(a) the superior court was not the proper division for consideration of this action and there were no grounds for transfer. Since the matter was properly in district court, respondents were not entitled under G.S. 7A-258(a) to move for a transfer to superior court. Thus, the prohibition contained in G.S. 7A-258(f)(1), against involuntary dismissal of an action in which a motion to transfer is pending, could not apply here to prohibit the dismissal by the court of respondent's counterclaim. Respondent Ward's contention is without merit.

Because the matter was properly in district court, we hold that the denial of respondents' oral motion for a continuance was not an abuse of discretion.

IV

[3] Respondent Ward has neglected to address the sole substantive issue that is properly presented by his appeal: whether the judgment of the trial court finding Ward Lumber Company in civil contempt of court was correct.

In their answer to the contempt petition, respondents asserted the unconstitutionality of the statute and the inspection plan and the invalidity of the inspection warrant. Respondents presented no evidence at the hearing, only moving to strike the testimony of the State's witness and to dismiss the action because of the alleged unconstitutionality of the law and because OSH "in every respect failed to meet its obligation under the law." Respondents offered no proof in support of the allegations of unconstitutionality. On appeal, Ward does not dispute the facts found by the court or even argue that they do not support the judgment of contempt. Under our rules of Appellate Procedure, failure to present arguments on questions raised by assignments of error in an appeal from a trial court constitutes abandonment of those assignments of error. App. R. 28(a). Nevertheless, we have carefully considered the trial court's judgment and hold that it was correct.

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On appeal from judgments of civil contempt, our review is limited to the questions of whether the trial court's findings of fact are supported by any competent evidence in the record, *Peoples v. Peoples*, 8 N.C. App. 136, 174 S.E. 2d 2 (1970), and whether the findings of fact warrant the judgment. *Willis v. Willis*, 2 N.C. App. 219, 162 S.E. 2d 592 (1968). The facts found by the trial court are amply supported in the record in the form of testimony at the hearing and the search warrant and supporting affidavit. The court concluded from these facts, *inter alia*, that respondent had wilfully refused to submit to the inspection warrant and that it had shown no legal cause for that refusal. The court's judgment is supported by its findings and conclusions and must be affirmed.

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

Chief Judge VAUGHN concurring.

I would consider the matters respondent attempts to raise on their merits. I would then find that the order of the trial court is in all respects correct and that respondent's arguments are totally lacking in merit.

MARVIN JENNINGS, KAY FRANCIS JENNINGS v. ALMONT E. LINDSEY,
MITCHELL R. CRISP, KENNETH M. HUGHES, EDGAR R. MABE

No. 8330SC684

(Filed 7 August 1984)

1. Rules of Civil Procedure §§ 12, 56— motion to dismiss before responsive pleading filed

Since defendants' motion to dismiss was made and granted prior to their filing any responsive pleading, it was properly before the court as a motion for summary judgment under G.S. 1A-1, Rule 56, and because plaintiffs' complaint was the only material before the trial court, defendants' motion was no different in effect from a motion to dismiss for failure to state a claim for relief under G.S. 1A-1, Rule 12(b)(6).

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2. Limitation of Actions § 8.2— fraud—time of discovery—action not barred by statute of limitations

The trial court erred in dismissing plaintiffs' claims for fraud on the ground that they were barred by the statute of limitations where plaintiffs alleged that they were engaged in a logging business with defendants; plaintiffs described the allegedly fraudulent acts and stated that they occurred in 1979 but were not discovered until 1981; and plaintiffs alleged that defendants were their accountants and this special relationship could excuse their failure to exercise due diligence.

3. Limitation of Actions § 4— unfair trade practices—four year statute of limitations

The trial court erred in dismissing plaintiffs' claims of unfair and deceptive trade practices on the ground that they were barred by the statute of limitations, since plaintiffs alleged that the practices occurred in 1979; their claim was filed in 1983; and G.S. 75-16.2 provides a four year statute of limitations for claims of unfair trade practices.

APPEAL by plaintiffs from *Burroughs, Judge*. Judgment entered 16 May 1983 in Superior Court, JACKSON County. Heard in the Court of Appeals 11 April 1984.

This is a civil action in which plaintiffs seek damages for alleged fraud and unfair trade practice. On 4 March 1983, plaintiffs' amended complaint was filed alleging fraud and unfair trade practices arising out of two separate transactions between plaintiffs and defendants. The following summary of facts is drawn from the complaint:

Plaintiff Marvin Jennings was a partner, with two of his brothers, in a logging operation doing business as Carolina Logging Company. Defendants were partners in an accounting firm that rendered professional services to Carolina Logging. By virtue of this business relationship, defendants were aware that Carolina Logging needed money and was experiencing financial difficulty. In January of 1979, defendants proposed to Carolina Logging that defendants Crisp and Lindsey would form a new corporation, Masters Lumber Co., Ltd., in which they and the three partners of Carolina Logging would be shareholders. Defendants Lindsey and Crisp would contribute cash while plaintiff and his partners would contribute the capital assets of Carolina Logging Company. Defendant Lindsey would be president while the former partners of Carolina Logging would be salaried employees of the new company. As president, defendant Lindsey

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was to apply for a loan of \$125,000. Each of the five shareholders was apparently responsible for providing security for a part of the loan and plaintiffs accordingly executed a \$25,000 promissory note payable to defendants Lindsey and Crisp. This note was in turn secured by a second deed of trust on plaintiffs' house. As a part of the transaction, the new corporation, Masters Lumber Co., was to assume responsibility for the outstanding debts of Carolina Logging Company.

Assets were transferred and notes were executed but no stock certificates were issued and the agreed payments on the outstanding debts of Carolina Logging were not made. No loan was applied for but defendants Crisp and Lindsey nevertheless held plaintiffs' \$25,000 promissory note and refused to discharge the deed of trust securing it.

In August of 1979, plaintiff Marvin Jennings terminated his relationship with Masters Lumber Company. From then until September of 1981, defendant Lindsey represented to plaintiffs that their remaining accounts and business with Masters Lumber Company would be settled. In September 1981, plaintiffs learned that defendants did not intend to settle with plaintiffs but rather that they intended to keep plaintiffs' promissory note and deed of trust. Plaintiffs allege that defendants committed other acts in the management of Masters Lumber Company that contributed to the primary allegation of fraud.

Plaintiffs further allege that in another transaction arising from the same business relationship, defendant Lindsey told plaintiffs in December 1977 that, if they would transfer two tracts of land to him and defendant Crisp that they (Lindsey and Crisp) would sell the land and use the proceeds to satisfy plaintiffs' outstanding debts to defendants, reimburse plaintiffs for their equity in the land, and distribute the remaining proceeds equally to themselves and plaintiffs. Plaintiffs transferred the land to Lindsey and Crisp who sold it in October 1978. Plaintiffs learned of the sale in 1979 at which time defendant Lindsey represented to them that he would settle with them when he collected the balance of the purchase price. Defendant Lindsey persisted in these representations until September of 1981 when plaintiffs learned that defendants did not intend to settle with them but intended to keep the proceeds of sale. Plaintiffs allege other actions

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by defendants relating to this transaction that contribute to their allegation of fraud.

With respect to both transactions, plaintiffs allege that defendants misused their positions of confidence and trust as plaintiffs' accountants to influence plaintiffs to enter into these transactions. Plaintiffs allege that defendants did so with intent to defraud plaintiffs, knowing that their representations were false or having at least a reckless disregard for their truthfulness. Plaintiffs allege that they reasonably relied on defendants' false representations and that they suffered damages as a result of this reliance. The first four counts in the complaint were based on fraud.

On the same facts, plaintiffs allege in the fifth and sixth counts of their amended complaint unfair or deceptive trade practices under G.S. 75-1-1. Plaintiffs requested injunctive relief, compensatory and punitive damages, treble damages for the alleged unfair trade practices, and attorney fees.

On 28 March 1983, before filing a responsive pleading, defendants moved to dismiss the four fraud counts on the grounds that they were barred by the statute of limitations. Defendants asserted that the acts complained of were all committed more than three years prior to the filing of the action, that none of the acts were concealed from plaintiffs and that plaintiffs, in the exercise of due care, should have discovered the alleged acts or omissions.

On 16 May 1983, the court entered the following order:

This cause coming on to be heard and being heard before the undersigned and having considered the relevant material in the file the Court entered the following Order on the defendants' motion to dismiss under Rule 8C as he alleged the statute of limitations having barred this action.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss under Rule 8(c) is allowed.

No responsive pleading was ever filed by defendants. Plaintiffs excepted and appealed from the entry of the order.

Ralph L. Hicks for plaintiff-appellants.

Creighton W. Sossoman for defendant-appellees.

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EAGLES, Judge.

Defendants contend that this action is barred by the statute of limitations. Plaintiffs urge that under the facts of this case, the statute of limitations does not bar their claims of fraud. We agree with plaintiffs.

I

[1] We note first that defendants' motion to dismiss was considered by the trial court as having been brought under G.S. 1A-1, Rule 8(c). Rule 8(c) is limited by its own terms to responsive pleadings. Defendants' motion here was made and granted prior to their filing any responsive pleading.

Dickens v. Puryear, 302 N.C. 437, 276 S.E. 2d 325 (1981), provides that "a party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim." *Id.* at 442, 276 S.E. 2d at 329. In that holding, our Supreme Court noted that this practice was consistent with the federal courts. *See* 2A Moore's Fed. Practice § 8.28 (2d ed. 1980). Therefore, defendants' motion to dismiss was properly before the court as a motion for summary judgment under G.S. 1A-1, Rule 56. Since plaintiffs' complaint was the only material before the trial court, the motion was no different in effect from a motion to dismiss for failure to state a claim for relief under G.S. 1A-1, Rule 12(b)(6). *Shoffner Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979).

Since defendants' motion is essentially one under G.S. 1A-1, Rule 12(b)(6), to dismiss plaintiffs' complaint for failure to state a claim for relief, the issues before the court are whether the complaint alleges the elements of at least some legally recognized claim and whether it provides sufficient notice of the events giving rise to the claim to enable the defendants to understand and respond to it. *Orange Co. v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890, *rev. denied*, 301 N.C. 94, --- S.E. 2d --- (1980). The complaint should be dismissed if it appears that plaintiffs are entitled to no relief under any set of facts that could be proven or if the complaint discloses on its face some fact that will necessarily defeat the claim. *Id.* The allegations in the complaint

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must be taken as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

II

G.S. 1-46, in conjunction with G.S. 1-52(9), provides that "an action . . . [f]or relief on the grounds of fraud or mistake" must be commenced within three years and that the "cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In considering the trial court's dismissal of plaintiffs' fraud claims, *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951), is instructive. Writing for the Supreme Court, Justice Johnson observed:

Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated "that fraud is better left undefined," lest, as *Lord Hardwicke* put it, "the craft of men should find a way of committing fraud which might escape a rule or definition." . . . However, in general terms, fraud may be said to embrace "all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another."

Id. at 113, 63 S.E. 2d at 205 (citations omitted).

Because fraud is difficult to define, it is likewise difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run. *Vail v. Vail* holds that where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations. "[T]he law regards the means of knowledge as the knowledge itself." *Id.* at 116, 63 S.E. 2d at 207. See also *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970). *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966); *Shepherd v. Shepherd*, 57 N.C. App. 680, 292 S.E. 2d 169 (1982). The existence and nature of a confidential relationship between the parties to a transaction may excuse a failure to use due diligence. *Bennett v. Anson Bank and Trust Co.*, 265 N.C. 148, 143

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S.E. 2d 312 (1965) (partnership); *Vail v. Vail, supra* (mother-son). However, a failure to use due diligence is not always excused by the existence of such a relationship. *Shepherd v. Shepherd, supra*.

III

[2] The only pleadings before the trial court here were plaintiffs' complaint and defendants' motion. The complaint appears to establish a *prima facie* case of fraud. See *Johnson v. Phoenix Mutual Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980) (summary judgment in actions for fraud). In the complaint, plaintiffs describe the allegedly fraudulent acts, disclosing that those acts occurred in 1979. Plaintiffs assert, however, that they did not discover the alleged fraud until September 1981. Defendants' motion asserts the three year statute of limitations in bar of plaintiffs' claims, arguing that the acts complained of occurred more than three years prior to the filing of the action and that plaintiffs should have discovered the alleged fraud at that time.

The applicable statute of limitations runs from the point when the fraud was, or should have been, discovered. *Vail v. Vail, supra*. We believe that plaintiffs' assertion that they did not discover the fraud until September of 1981 is sufficient to establish the approximate date from which the statute of limitations began to run on their claims. Defendants' unsupported assertion to the contrary merely creates a conflict that, in the procedural context of this case, must be resolved in plaintiffs' favor. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979).

Moreover, plaintiffs have alleged the existence of a special relationship between themselves and defendants that could excuse their failure to exercise due diligence. Defendants were plaintiffs' accountants. By virtue of this relationship, plaintiffs reposed a certain amount of trust and confidence in defendants and even executed a power of attorney in favor of defendant Lindsey. The fact that plaintiffs terminated their business relationship with Masters Lumber Company in August of 1979 does not mean that they terminated their special relationship with defendants as their accountants. Nor does termination of the business relationship with Masters Lumber Company mean that there was no longer a business relationship between plaintiffs and the individual defendants that could be shown to excuse plaintiffs' failure to exercise due diligence. Accordingly, we hold that plain-

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tiffs' action has not been shown to be barred by the statute of limitations.

IV

[3] Plaintiffs also assign as error the dismissal of the fifth and sixth counts of their complaint, the claims of unfair and deceptive trade practice. For the reasons set forth above, we hold that their claims are not barred by the statute of limitations and that they were incorrectly dismissed. We note further that G.S. 75-16.2 provides a four year statute of limitations for actions arising under G.S. 75-1 *et seq.*, dealing with unfair trade practices. The fifth and sixth claims are based on the same facts that plaintiffs alleged in support of their fraud claims. Even if the fraud claims were barred by the three year limitation of G.S. 1-52, the unfair trade practice claims, being controlled by a four year statute, would not necessarily be barred.

For the reasons set forth above, the order of the trial court dismissing plaintiffs' action is

Reversed.

Chief Judge VAUGHN and Judge BRASWELL concur.

SHARON ROWE STEPHENSON, SANDRA ROWE FAULKNER, SHEILA ROWE AND MAXINE ROWE AS GUARDIAN AD LITEM FOR SYLVIA PAULETTE ROWE, A MINOR, ANGELA ALINE ROWE, A MINOR, KATHERINE LOUISE ROWE, A MINOR, AND AARON WILLIAM ROWE, A MINOR, AND JOHN J. SCHRAMM, AS GUARDIAN AD LITEM FOR UNBORN PERSONS v. LUCILLE JONES ROWE, INDIVIDUALLY, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF AARON WILLIAM ROWE, AND AS TRUSTEE UNDER THE WILL OF AARON WILLIAM ROWE

No. 8322SC774

(Filed 7 August 1984)

Wills § 1.4— devise of real property—no definite description—devise invalid

The trial court erred in granting summary judgment for defendant in an action to determine the validity of an ambiguous devise of real estate in a will where the provision in question devised to testator's wife "the homeplace occupied by us at the time of my death, together with thirty (30) acres of real

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estate immediately surrounding the homeplace," since the will furnished no means by which the 30 acres could be identified and set apart, nor did the will refer to anything extrinsic by which the 30 acres could be located.

Judge BECTON dissenting.

APPEAL by plaintiffs from *Helms, Judge*. Judgment entered 18 February 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 2 May 1984.

William T. Graham for plaintiff appellants.

Rudisill & Brackett, P.A., by J. Richardson Rudisill, Jr., for defendant appellee.

JOHNSON, Judge.

This case involves the validity of an ambiguous devise of real estate in a will. We hold that the trial court erred in ruling that the devise was valid and in granting summary judgment to defendant accordingly.

I

The testator, Aaron William Rowe, owned a large farm of about 160 acres, where he lived with his second wife, Lucille Jones Rowe. His will contained the following provision:

I will, devise and bequeath to my wife, Lucille Jones Rowe, the homeplace occupied by us at the time of my death, together with thirty (30) acres of real estate immediately surrounding the homeplace, to be hers in fee simple, absolutely and forever.

A general residuary clause placed the remainder of the testator's property, both real and personal, in trust for Lucille Rowe and the testator's seven children by his first marriage, with Lucille Rowe as trustee. The trust property was to be divided equally among the beneficiaries.

The thirty-acre devise was not surveyed or fenced off before the testator's death. After his death, Lucille Rowe, in her capacity as executrix, had the thirty-acre tract surveyed and deeded to herself individually.

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Plaintiffs, three of the testator's children, his first wife, Maxine Rowe, as guardian ad litem for the minor children, and a guardian ad litem for the children's unborn issue, filed the present action seeking a construction of the will and a declaration that the attempted thirty-acre devise failed for vagueness. Defendant, Lucille Rowe, individually and in her capacity as executrix (hereinafter referred to simply as defendant), filed a lengthy answer contending that the will was at most latently ambiguous, or in the alternative, counterclaimed that the court should impose a constructive trust on the land. She then moved for partial summary judgment on the construction issue, supported by numerous affidavits describing the testator's expressions of intent before his death. Plaintiffs moved to dismiss the counterclaim and for summary judgment. The trial court denied the motion to dismiss and granted summary judgment to defendant on her motion, ruling that Lucille Rowe individually held title to the thirty-acre tract as set forth in the survey made after the testator's death. From this order, plaintiffs appeal.

II

Defendant moved to dismiss the appeal for plaintiffs' failure to file it within the 150-day limit set by the Rules of Appellate Procedure. 4A N.C. Gen. Stat. App. I (2A), N.C. R. App. P. 12(a) (Supp. 1983). Although the trial court apparently announced its judgment at a hearing in November 1982, it did not render a signed judgment until February 1983, at which time it also signed and filed plaintiffs' appeal entries. Plaintiffs filed the record in this Court in July 1983. The 150-day limit depends on the giving of notice of appeal. It is well established that the time limit for giving notice starts to run when the trial judge announces his decision in open court, unless the court provides for judgment to be effective on signing. The date of the written order does not control. N.C. Gen. Stat. § 1-279 (1983); N.C. Gen. Stat. § 1A-1, Rule 58 (1983); 4A N.C. Gen. Stat. App. I (2A), N.C. R. App. P. 3 (Supp. 1983); *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983). Plaintiff appellants made no motion to extend the time for filing the appeal, and thus it is subject to dismissal. Nevertheless, in our discretion, we treat the purported appeal as an application for writ of certiorari, allow same, and proceed to consider the

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merits. N.C. Gen. Stat. § 7A-32(c) (1981); 4A N.C. Gen. Stat. App. I (2A); N.C. R. App. P. 21 (Supp. 1983).

III

Plaintiffs first challenge the form of the judgment. We find the summary judgment order sufficiently clear to dispose of this assignment. The trial court ruled that the will was, at worst, latently ambiguous, and that plaintiffs forecast no extrinsic evidence, which would raise a genuine issue of fact as to which thirty acres testator intended to devise to defendant. Plaintiffs raised no other issues in their Complaint, except whether defendant was appointed as trustee under the will. The will itself clearly and definitively answers that issue in defendant's favor. Once the trial court granted summary judgment on the construction issue, defendant's counterclaim for the declaration of a constructive trust became moot. Since the trial court accepted defendant's evidence that testator intended to devise a certain thirty acres, and since that thirty acres had already been deeded to Lucille Rowe and no longer abutted any other property of the estate, it appears that no further judicial proceedings were necessary to establish the boundaries. Accordingly, the summary judgment, although nominally partial, effectively resolved all issues. Since the summary judgment against plaintiffs resolved the case, the trial court could properly tax costs following the judgment. N.C. Gen. Stat. § 6-21 (1981).

IV

As a result, the only question we need decide is the propriety of the grant of summary judgment on the construction issue.

In construing a will, the intent of the testator is the "polar star" which guides the courts. *Adcock v. Perry*, 305 N.C. 625, 290 S.E. 2d 608 (1982). The testator unequivocally intended to give Lucille Rowe thirty acres of land, and we should not lightly disregard such clearly expressed wishes.

However, we may perform our duty to give effect to the intent of the testator only within the limits of the rules of law fixed by statute and decisions of our courts. *Dearman v. Bruns*, 11 N.C. App. 564, 181 S.E. 2d 809, cert. denied, 279 N.C. 394, 183 S.E. 2d 241 (1971). One such rule, applicable here, was established by our Supreme Court in *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723

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(1940). There, the testator attempted to devise out of a total holding of 165 acres "25 acres of the home tract of land including the building and outhouses. . . ." In affirming the trial court's ruling that the attempted devise failed for vagueness, the *Hodges* Court held:

The will furnishes no means by which the twenty-five acres can be identified and set apart, nor does the will refer to anything extrinsic by which the twenty-five acres can be located. The will fixes no beginning point or boundary. It is too vague and indefinite to admit of parol evidence to support it. There is nothing to indicate where or how the testator intended the twenty-five acres should be set apart out of the 82 acres in the home tract. The principle is firmly established in our law that a conveyance of land by deed or will must set forth a subject matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the instrument refers. *It is essential to the validity of a devise of land that the land be described with sufficient definiteness and certainty to be located and distinguished from other land.* [Emphasis added.]

218 N.C. at 291, 10 S.E. 2d at 724. The only difference between this case and *Hodges* lies in the words "immediately surrounding." These fix no beginning point or boundary, however. They do not indicate how the 30 acres are to be separated from the other land, except by mathematical speculation. They are thus too vague and indefinite "to admit of parol evidence to support them." *Id.* Therefore, the trial court erred in implicitly ruling, as it must have to consider defendant's parol evidence, that the devise was only latently ambiguous. *A fortiori*, the summary judgment based thereon also constituted error.

V

Defendant attempts to distinguish *Hodges*, citing *Redd v. Taylor*, 270 N.C. 14, 153 S.E. 2d 761 (1967), in which a devise of "the part of the Farm . . . that they want" was held valid. The testator and devisees in *Redd* had agreed prior to the testator's death which land would pass, however, and the land was described in a lease between them. The Court specifically distinguished *Hodges*, on the ground that that case had required a separation, while *Redd* required only an "identification," by

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means of the testatrix's declarations and documents in existence during the testatrix's lifetime. Plaintiffs advance no extrinsic evidence *existing before the testator's death* to support their claim.

In *Cable v. Hardin Oil Co.*, 10 N.C. App. 569, 179 S.E. 2d 829, *cert. denied*, 278 N.C. 521, 180 S.E. 2d 863 (1971), we upheld a devise of 25 acres out of a 73 acre tract. There, however, the will specifically provided that the tract was "to be selected" by the devisee. The express grant of a power of selection took *Cable* out of the rule of *Hodges*. No such express grant to defendant appears in this will. Although her powers as trustee are extensive, they do not include the power to transfer portions of the trust assets to selected individual beneficiaries. We therefore must hold that *Hodges* applies, and that the devise must fail.

VI

Relying on *Taylor v. Taylor*, 45 N.C. App. 449, 263 S.E. 2d 351, *rev'd on other grounds*, 301 N.C. 357, 271 S.E. 2d 506 (1980), defendant contends that if the devise of 30 acres fails, the residuary clause must fail as well. *Taylor* concerned a specific devise of the "remainder of my real estate," which we held must fail with the overly vague devise of the home and "30 Acres of land surrounding the same," since the remainder clause depended on the first for its determination. Here on the other hand there was an independent and effective general residuary clause, absent in *Taylor*. Therefore *Taylor* is distinguishable and the devise of testator's real estate to the trust may stand.

VII

We are aware that our result, mandated by *Hodges*, is contradictory to the express intent of the testator. *Hodges* has been criticized as imposing too strict a requirement, most recently in *Taylor v. Taylor* (Robert M. Martin, J., dissenting). See also Annot., 157 A.L.R. 1129 (1945). Judge Robert Martin explicitly invited the Supreme Court by his dissent in *Taylor* to reconsider *Hodges*. In reversing on other grounds, the Supreme Court implicitly refused to do so. Because defendant has failed to show why *Hodges* should not apply, *Hodges* must supply the rule of de-

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cision. Therefore, the order must be vacated and the cause remanded for proceedings consistent with this opinion.

Vacated and remanded.

Judge WELLS concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that the *Hodges* decision, relied on by the majority, overlooks the fundamental distinction between the sufficiency of descriptions required in deeds as opposed to devises under wills, I dissent.

Judge Robert Martin dissented in *Taylor v. Taylor*, raising precisely the same question, *i.e.*, the soundness of the rule in *Hodges*. In his dissent, Judge Martin expressly invited the Supreme Court to reconsider *Hodges*; however, the Supreme Court reversed without reaching the question, since the surviving spouse's effective dissent from the will rendered the validity of the will's provisions moot. The surviving spouse has not dissented in the present case, and the viability of *Hodges* is thus squarely presented.

The *Hodges* Court declared a devise of "twenty-five acres of the home tract including the building and outhouses" void for vagueness based on "[t]he principle . . . firmly established in our law that a conveyance of land by deed or will must set forth a subject matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the instrument refers." 218 N.C. at 291, 10 S.E. 2d at 724. Yet the deed construction cases cited in *Hodges* to support this principle refer exclusively to conveyances of land by deed or other writing. See, *e.g.*, *Cathey v. Buchanan Lumber Co.*, 151 N.C. 592, 66 S.E. 580 (1909). A will is not a conveyance. 5A G. Thompson, *Real Property* § 2603, at 289 (1978); Black's Law Dictionary 402 (4th ed. 1951). Therefore, I believe that the principles governing deed constructions are inapposite to the validity of devises under a will. A simple policy reason for applying different principles of construction presents itself: the parties may correct an improperly drawn

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deed, while a testator, after death, cannot remedy technical mistakes in drafting.

As stated by the majority, *supra*, "[i]n construing a will, the intent of the testator is the 'polar star' which guides the courts." Clearly, a testator's intent differs substantially from a grantor's. The nature of the cases relied on in *Hodges*, actions to recover land and actions of ejectment involving the grantor or his other grantees as plaintiffs or defendants, reveals the need for great specificity in deeds. In each case cited in *Hodges*, the grantor had conveyed away a portion of a larger tract. Applying the principles of contract law, the court in each case attempted to discern the grantor's intent in the deed description. Faced with vague descriptions, the court declared the deed void on the presumption that the grantor intended to convey fee title to a *specific* piece of property but failed to clarify his intent. To enforce the irrevocably vague deed description, by creating a tenancy in common, would have potentially contradicted the grantor's unclarified intent and penalized the grantor or his other grantees.

Meanwhile, a testator's intent is simpler to discern. The testator wishes to devise his entire estate. He is not retaining a portion of the real property for himself, nor is there any chance he will devise the same property to two parties under the same will. He intends to devise all his real property, but since he is not protecting his own property interest, he may not have particular pieces of property in mind—just a fraction of the whole, a piece of the pie. Prior to *Hodges*, our Supreme Court had long recognized a testator's non-specific intent when faced with several devisees of specified acreage and effectuated it by declaring the devisees tenants-in-common. *See Caudle v. Caudle*, 159 N.C. 53, 74 S.E. 631 (1912); *Wright v. Harris*, 116 N.C. 462, 21 S.E. 914 (1895); *Harvey v. Harvey*, 72 N.C. 570 (1875); *see also* Annot., 157 A.L.R. 1129 (1945). Consequently, the land description in a devise need not meet the standard set in *Hodges* to fulfill a testator's intent. The quantity of land is the only essential term. The *Hodges* standard, as applied to wills, confounds a testator's intent and should be abandoned.

The trial court, in an obvious attempt to circumvent the rule in *Hodges*, implicitly ruled that the devise to defendant was only latently ambiguous, admitted defendant's parol evidence, and

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granted defendant title to a specific thirty acres. It is clear that the devise was too vague to admit parol evidence and grant title to a specific tract. Therefore, summary judgment on this theory was improper. However, applying the law in *Caudle*, *Wright*, and *Harvey*, I believe that summary judgment in favor of defendant is still proper: the non-specific devises created a tenancy-in-common. Under the terms of the will, defendant is entitled to thirty acres plus 1/8 of the remaining real property held in trust under the residuary clause, as a tenant-in-common with the remaining seven beneficiaries under the residuary clause.

Considering the trust aspect of the residuary clause, I believe the case should be remanded so that the trial court can appoint a panel of commissioners to set aside the thirty acres devised outright to defendant. *Id.*

BETTY McDOWELL, ADMINISTRATRIX OF THE ESTATE OF JOHN ANDERSON, JR., SHARON ANDERSON AND CURTIS McDOWELL, MINOR BENEFICIARIES OF THE ESTATE OF JOHN ANDERSON, JR., BY AND THROUGH THEIR GUARDIAN, BETTY McDOWELL v. THE ESTATE OF JOHN ANDERSON, SR. AND THE ADMINISTRATOR OF SAID ESTATE, NATHAN E. ANDERSON

No. 8326SC367

(Filed 7 August 1984)

1. Death § 11— wrongful death—no recovery by negligent beneficiary—no recovery by innocent beneficiary

Plaintiff daughter was not entitled to wrongful death proceeds arising from her brother's death in an automobile accident because the estate of her father was the sole direct beneficiary of the wrongful death proceeds arising from the son's death, and the father's estate was prevented from recovery due to the father's wrongdoing.

2. Descent and Distribution § 1— beneficiaries in wrongful death action—determination at time of death

Beneficiaries in a wrongful death action are to be determined at the time of the intestate's death, even though beneficiary and intestate may die the same day.

3. Insurance § 104— automobile liability insurance—no determination of insured's liability—no unjust enrichment of insurance carrier

There was no merit to plaintiff's contention that her father's automobile liability insurance carrier would be unjustly enriched if she were not allowed

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to recover proceeds for the wrongful death of her brother, since an automobile liability insurance policy is a contract which provides indemnification against liability as opposed to indemnification against loss or death; if the insured father was not found by law to be liable to anyone for his son's wrongful death, the liability insurance carrier was not responsible for indemnifying the father or his estate; and, until that determination was made, no insurance "fund" was created and the insurance carrier was not unjustly enriched.

APPEAL by plaintiff from *Snepp, Judge*. Order entered 25 January 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 March 1984.

This action arises from an automobile accident on 30 January 1981 in which plaintiff's intestate, John Aaron Anderson, Jr. was killed. Betty McDowell, as administratrix of the Estate of John Aaron Anderson, Jr., and as guardian of the minor sister, Sharon Annette Anderson, and of the minor half brother, Curtis McDowell, filed a complaint pursuant to the North Carolina Wrongful Death Statute G.S. 28A-18-2. Curtis McDowell is no longer a party for the purposes of appeal.

Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, P.A., by Karl Adkins, for plaintiff appellant.

Kennedy, Covington, Lobdell and Hickman, by William C. Livingston, for defendant appellee.

JOHNSON, Judge.

The issue presented for review is whether an innocent beneficiary may reach wrongful death proceeds of her deceased brother through the estate of the deceased father, who was a negligent beneficiary. We conclude that because the father is barred from recovery by his wrongdoing, the innocent beneficiary who must claim through the negligent beneficiary's estate is also barred.

On 30 January 1981, John Aaron Anderson, Sr. was operating a 1972 Chevrolet on North Carolina Highway 16. With him in the car as passengers were Mary Hunter Anderson, his wife, and John Aaron Anderson, Jr., their son. The parties agree that as the Chevrolet proceeded in a southeasterly direction, it collided with a 1974 Kenworth fuel tanker proceeding in a northwesterly direction. Plaintiff, however, alleges that John, Sr. was negligent in operating his vehicle in that he failed to keep it under proper

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control and that he failed to give an approaching vehicle one-half of the highway. Plaintiff contends that as the vehicles were approaching each other, John, Sr. ran off the right side of the road, lost control of his vehicle, and skidded across the road directly into the path of the oncoming fuel tanker truck, causing the truck to strike the car broadside. Defendant, on the other hand, makes no contention as to the exact sequence of events leading up to the collision, but nevertheless denies that John, Sr. was negligent. Defendant does not allege that the driver of the fuel tanker truck was in any way negligent.

It is undisputed that as a result of the collision, the son, John, Jr., and the wife, Mary, died within minutes of the accident. John, Sr. survived the crash itself, but died three hours later from injuries sustained in the collision.

[1] Both plaintiff and defendant filed motions for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. G.S. 1A-1, Rule 56. Plaintiff moved for summary judgment with regard to two issues: (1) that G.S. 1-539.21 abolishes the common law defense of parent-child immunity in personal injury actions involving motor vehicles and (2) that G.S. 1-539.21's abolition of the common law defense of parent-child immunity is not unconstitutional as a violation of the guaranty of equal protection pursuant to the Fourteenth Amendment of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution. The trial court granted plaintiff's motion for summary judgment on these two issues.¹ Defendant also moved for summary judgment, arguing that the plaintiff was barred from recovery of wrongful death proceeds through her father's estate because the father was the sole beneficiary and he was barred from recovery by his own negligence. The court granted defendant's motion for summary judgment and concluded as a matter of law that plaintiff was not entitled to wrongful death proceeds because the estate of the

1. Defendant appellee cross-assigned error to the grant of summary judgment for plaintiff on these two issues. However, defendant concedes that both issues were addressed and resolved against him in *Carver v. Carver*, 55 N.C. App. 716, 286 S.E. 2d 799, cert. denied, 305 N.C. 584, 292 S.E. 2d 569 (1982), and *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E. 2d 862 (1978), cert. denied, 296 N.C. 585, 254 S.E. 2d 35 (1979), respectively. Although defendant nevertheless endeavors to preserve these issues for review, he has not briefed them. Therefore, this Court will not re-examine these previously decided questions.

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father was the sole direct beneficiary of the wrongful death proceeds arising from the son's death, and the father's estate was prevented from recovery due to the father's wrongdoing. The plaintiff appeals from the court's grant of defendant's motion for summary judgment.

Rule 56(c) provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). The material issues of fact in the case *sub judice* were effectively established when the plaintiff failed to respond to defendant's 20 July 1982 request for admission made pursuant to G.S. 1A-1, Rule 36. Therefore, the question becomes whether the defendant was entitled to judgment as a matter of law.

Plaintiff contends that she should not be barred from recovery of proceeds from the wrongful death of her brother due to the negligence of her father. Plaintiff also claims that barring all recovery to her would unjustly enrich the father's automobile liability insurance carrier. We disagree with both contentions.

Plaintiff recognizes that, as a general rule, a tortfeasor beneficiary will not be allowed to profit from his legally unacceptable conduct. *Davenport v. Patrick*, 227 N.C. 686, 689, 44 S.E. 2d 203, 205 (1947). However, plaintiff argues that the negligence of one party should not be imputed to an innocent beneficiary so as to bar her right to recover. *Pearson v. Stores Corp.*, 219 N.C. 717, 722, 14 S.E. 2d 811, 814 (1941). Further, plaintiff contends that preventing her recovery would penalize an innocent party for her father's negligence.

Plaintiff overlooks the fact that she simply is not a direct beneficiary of her brother's estate and is therefore not entitled to recover for his wrongful death. The right of action at issue exists by virtue of G.S. 28A-18-2, which provides that the proceeds of a wrongful death action are to be disposed of as directed by the Intestate Succession Act. The relevant section of the Intestate Succession Act, G.S. 29-15(3), provides that if the intestate dies without being survived by a spouse, lineal descendants, or both

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parents, but is survived by one parent, the surviving parent shall take the entire share.

Due to the fact that the brother's surviving parent, John, Sr. died subsequent to John, Jr.'s death, it is necessary to consider at what point in time beneficiaries under the Intestate Succession Act are determined. The Supreme Court, in *Davenport v. Patrick*, *supra*, held that the identity of beneficiaries is to be determined at the time of the intestate's death. 227 N.C. at 689, 44 S.E. 2d at 205. See also *Bank v. Hackney*, 266 N.C. 17, 145 S.E. 2d 352 (1965); *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676 (1965). Here, the intestate son, John, Jr., had no lineal descendants and no spouse at the time of his death. His mother died at approximately the same time as he did and, aside from his sister, only John, Jr.'s father survived him. Therefore, the father is the sole beneficiary of the estate of the son under the statute. The fact of the father's subsequent death is irrelevant to the determination of the beneficiaries of the son's estate at the time of *his* death.

[2] Plaintiff asks this Court to relax the rule that beneficiaries are determined at the time of death and thereby bypass the father in the line of intestate succession, although he survived his son by approximately three hours. Plaintiff contends that to do otherwise under the facts of this case would be making a "fetish" of the common law. However, despite the appeal of plaintiff's request, to adopt the reasoning of the plaintiff would require that this Court overrule *Davenport* and *Hackney*. In *Hackney*, a case similar to the case *sub judice*, the wife was killed in an automobile accident caused by the negligence of her husband. The husband died the same day, but a short time after the wife died. One defense raised by the executor of the husband's estate to the wrongful death action was that any recovery on behalf of the couple's children would have to be reduced by the share that the husband would otherwise be entitled to take under the Intestate Succession Act. The Supreme Court apparently did not find it a "fetish" to reduce the children's recovery, even though the husband-tortfeasor was in no position to benefit by his wrongdoing and all the proceeds of the recovery were destined for the deceased couple's children. Rather, the Court reaffirmed the rule that the beneficiaries in a wrongful death action are to be determined at the time of the intestate's death, even though the hus-

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band died the same day as the wife. *Bank v. Hackney, supra*, at 20, 145 S.E. 2d at 355.

It may appear unfair that the daughter is denied a wrongful death recovery because the father lived for three hours after the son died, but it would seem equally unfair for the daughter to be denied a recovery if the father lived for an additional week, a month or a year, and then died. At some arbitrarily selected point, the courts would have to deny recovery, so that the decedent's estate could be settled and the personal representative released. We find no principled distinction between these situations. Relaxation of the rule in this case would undoubtedly lead to further uncertainty in the administration of decedent's estates, however appealing such a holding would be under the facts of this case.

With these considerations in mind, we are of the opinion that adoption of a rule allowing for the determination of beneficiaries at some time other than death must come through the legislature, rather than the judiciary.² Until such time that the rule is changed, this Court is constrained to find that the father is the sole beneficiary of any wrongful death action on the son's behalf.

Accordingly, the plaintiff is not a beneficiary of her brother's estate and is not entitled to wrongful death proceeds directly from his estate. Instead, she is the direct beneficiary of her father's estate. Therefore, the issue becomes whether the negligent party's estate may serve as a conduit for recovery flowing to the non-negligent plaintiff. We conclude that plaintiff may not recover through the negligent party's estate.

Public policy in North Carolina, buttressed by uniform judicial decisions, will not allow a wrongdoer to enrich himself as a result of his own negligent conduct. *Davenport, supra*, at 689, 44 S.E. 2d at 205. Although the father was the sole beneficiary of his

2. Solutions exist which would give appellant the result she desires. For example, Section 2-104 of the Uniform Probate Code (U.P.C.) provides: "Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of . . . intestate succession, and the decedent's heirs are determined accordingly." Unif. Probate Code § 2-104, 8 U.L.A. 64 (1983). If the U.P.C. was in effect in North Carolina, the plaintiff, not the father, would be the beneficiary in this instance. However, the U.P.C. has not been legislatively adopted in North Carolina.

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son's estate, he may not benefit as a result of his own wrongdoing. Recovery must be reduced by the wrongdoer's share, which in this case is equal to the entire estate. Therefore, the plaintiff can receive no recovery through the father's estate under the Wrongful Death Act.

[3] The second issue raised by plaintiff is whether the father's automobile liability insurance carrier would be unjustly enriched if plaintiff is not allowed to recover. Plaintiff advocates the establishment of a constructive trust to be held by the father's estate for the benefit of the plaintiff.

Plaintiff implicitly assumes that there are insurance proceeds which will accrue to the insurance carrier if they are not disbursed to a beneficiary. Plaintiff argues that as long as the tortfeasor father was negligent, and his negligence was the proximate cause of the son's death, the insurance carrier is liable for the father's damages and a "fund" is created to compensate for the damages. The cases cited by plaintiff in support of this argument, however, involve either life insurance, *Gardner v. Insurance Co.*, 22 N.C. App. 404, 206 S.E. 2d 818, *cert. denied*, 285 N.C. 658, 207 S.E. 2d 753 (1974), or tenancy by entirety, *In re Estate of Perry*, 256 N.C. 65, 123 S.E. 2d 99 (1961); *Homanich v. Miller*, 28 N.C. App. 451, 221 S.E. 2d 739, *cert. denied*, 289 N.C. 614, 223 S.E. 2d 392 (1976); *Porth v. Porth*, 3 N.C. App. 485, 165 S.E. 2d 508 (1969). Plaintiff confuses liability insurance with life insurance and her reliance upon the cited cases is misplaced. In the case of life insurance, once the event of risk which is insured against—death—occurs, there is an insurance "fund" created which is similar in concept to a savings account. 44 C.J.S., Insurance, § 25, p. 484. This fund must be distributed to the decedent's beneficiary or beneficiaries. The insurance carrier may not retain monies it is obligated to pay under life insurance policy simply because of some unusual circumstance which "muddies the waters" of the usual pattern of distribution. *Bullock v. Insurance Co.*, 234 N.C. 254, 67 S.E. 2d 71 (1951); *Anderson v. Parker*, 152 N.C. 1, 67 S.E. 53 (1910); *see also* 7 Strong's N.C. Index 3d, Insurance § 35, p. 396. In those cases, if the beneficiary is barred from recovery for his wrongdoing, the life insurance carrier is nevertheless liable for the proceeds in the absence of fraud or specific contract provisions to the contrary. Annot., 27 A.L.R. 3d 823 (1969). To do otherwise would unjustly enrich the life insurance carrier.

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In the case *sub judice*, however, the insurance policy in question is not a life insurance policy; it is an automobile liability insurance policy. Accordingly, the question is not who is entitled to the proceeds of the father's insurance, but rather, whether the father, and therefore the insurance carrier, are liable at all. Automobile liability insurance is a form of insurance which indemnifies against liability incurred by the insured due to injury to the person or property of another. An automobile liability insurance policy is a contract which provides indemnification against liability, as opposed to indemnification against loss or death. Black's Law Dictionary, 5th Ed.; 44 C.J.S., Insurance §§ 21, 24, p. 481. If the insured father is not found, by law, to be liable to anyone for the son's wrongful death, the liability insurance carrier is not responsible for indemnifying the father, or his estate. Hence, until that determination is made, no insurance "fund" is created and the insurance carrier is not unjustly enriched. In *Bank v. Hackney*, *supra*, the recovery by the non-negligent children for the wrongful death of their mother was reduced by the share of their negligent, deceased father. The court explicitly assumed that the father possesses automobile liability insurance. 266 N.C. at 22-23, 145 S.E. 2d at 357. Yet the *Hackney* Court did not consider the insurer unjustly enriched because its liability was reduced by the negligent beneficiary's share. No constructive trust was imposed. Here, as in *Hackney*, we find no unjust enrichment of the insurance carrier and, therefore, no need for a constructive trust.

For the above reasons, plaintiff is not entitled to recover wrongful death proceeds. We find that the trial court did not err in granting defendant's motion for summary judgment. The order appealed from is

Affirmed.

Judges HEDRICK and HILL concur.

Fraver v. N. C. Farm Bureau Ins. Co.

R. E. FRAVER, J. RIVES MANNING, JR., J. C. FAUST, HUBERT HAMPTON MARTIN, WILLIAM A. PLEASANT, C. B. WEATHERLY, JR., JERRY HOLT, LEE WILLIAMS, JIMMY McELRATH, DWIGHT FRAVER, MIKE STEINER, DAVID MARION, JAMES K. WRIGHT, CHARLES T. MONTJOY, JR., WILLIAM A. DAVENPORT, JR., ALBERT L. HUDSON, MAX K. ROBERTS, TED BRIGHT, DON R. MATTHEWS, LLOYD EDWIN SCOTT, AND BILLY RAY STALEY, PLAINTIFFS; WILLIAM S. KIRBY, HERBERT M. SPEAS, JR., ROBERT L. DOBBINS, LINDA G. HAMRICK, DENNIS L. RILEY, SR., CHARLES D. TODD, AND EDWARD L. LOWDER, INTERVENOR-PLAINTIFFS; RON WORTHINGTON, DAVID BREEDEN, PEGGY HORNEY, HARRY HORNEY, AND WALTER F. JOHNSON, PLAINTIFFS; ROBERT J. WOMBLE, INTERVENOR-PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, A CORPORATION, DEFENDANT

No. 8314SC990

(Filed 7 August 1984)

1. Insurance § 2.6— agents' commission—method of figuring

Where plaintiffs contended that they were entitled to certain bonus renewal commissions for the year 1979 pursuant to their agent/agency manager agreements with defendant insurance company, but defendant claimed that, under the contracts, it was under no obligation to pay a bonus renewal commission when its loss ratio exceeded 63%, defendant met its burden of showing that no genuine issue of fact existed for trial since the company loss ratio as reflected in its annual statement to the N. C. Insurance Department in 1979 exceeded 63%, and pursuant to the Insurance Department accounting policies recoupments received by defendant through its participation in the N. C. Motor Vehicle Reinsurance Facility for 1979 could not be included in the loss ratio calculation to make it less than 63%.

2. Contracts § 20.1— insurance agents' commissions—establishment of Reinsurance Facility—no frustration of performance

In a dispute between plaintiff agents and agency managers and defendant insurance company regarding bonus renewal commissions, plaintiffs could not successfully argue that the establishment of the N. C. Reinsurance Facility caused such a change of circumstances as to justify the application of the frustration of purpose doctrine, since the doctrine of frustration operates to excuse performance of a contract, not compel performance by the other party; and the doctrine does not apply if the parties have in their contract allocated the risk involved in the frustrating event.

3. Contracts § 4.1— insurance agents' commissions—amendment of contract—sufficiency of consideration

In a dispute between plaintiff agents and agency managers and defendant insurance company regarding bonus renewal commissions, plaintiffs could not complain that a loss ratio precondition which was incorporated into many of their contracts by way of amendment was not supported by consideration, since the contracts in question were terminable at will by either party and

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could be modified at any time by either party with the continuance of the relationship serving as the consideration for the modification; moreover, plaintiffs received the bonus renewal commission every year prior to 1979 and could not thereafter complain that the amendment was not supported by sufficient consideration.

APPEAL by plaintiffs and intervenor-plaintiffs Fraver, *et al.*, Kirby, *et al.*, Worthington, *et al.*, and Womble, *et al.*, from *McLeland*, Judge. Order entered 24 March 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 June 1984.

Powe, Porter and Alphin by Charles R. Holton, David E. Fox and Bryan E. Lessley for plaintiff appellants.

Merriman, Nicholls, Crampton, Dombalis & Aldridge by W. Sidney Aldridge and Gregory B. Crampton; Broughton, Wilkins & Webb by J. Melville Broughton; and Robert B. Broughton, of Counsel, for defendant appellee.

BRASWELL, Judge.

[1] In a dispute between the insurance company and its former agents and agency managers, the plaintiffs and intervenor-plaintiffs contend that they were entitled to certain bonus renewal commissions for the year 1979 pursuant to their agent/agency manager agreements. The defendant, on the other hand, asserts that according to these agent/agency manager contracts it was not obligated to pay the bonus renewal commissions since the insurance company's loss ratio exceeded sixty-three percent in 1979. Upon the defendant's motion, the trial court entered summary judgment in favor of the defendant. The plaintiffs and intervenor-plaintiffs have appealed this ruling.

Procedurally, the present controversy originally began as two lawsuits. Both suits set forth the same factual allegations but were brought by different plaintiffs. William S. Kirby, *et al.*, were allowed to intervene in the Fraver action. Robert Womble was permitted to intervene in the Worthington suit. Pursuant to the plaintiffs' motion, the trial court consolidated the matters for hearing on the defendant's motion for summary judgment.

North Carolina Farm Bureau Mutual Insurance Company markets its insurance through independent agents. Each agent or

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agency manager must enter into an agent/agency manager agreement with the defendant which governs their relationship. Those agreements provide for the payment of a bonus renewal commission to the agent/agency manager if certain stated preconditions are satisfied. The Agent's Contract states:

10. Company shall pay to Agent a bonus of 2% of all his premiums, (excluding Crop Hail and Tobacco Floater) in his territory, if a production quota assigned by the Company is reached and if the Company loss ratio (annual statement to Insurance Department) for the year in question does not exceed 63%

This precondition is also contained in the Agency Manager's Agreement.

In 1979, the plaintiff and intervenor-plaintiffs were not paid a bonus renewal commission. The defendant contends that the commission was not paid because the company loss ratio, as reflected in its annual report to the North Carolina Department of Insurance, exceeded 63%. The defendant further asserts that, in determining whether the 63% loss ratio precondition has been met, it has consistently used (in previous years when the commission was paid as well as in 1979) the figure found on Form 2, Underwriting and Investing Investment Exhibit on page 9, line 31, column 8 of the Annual Statement to the Insurance Department. The plaintiffs and intervenor-plaintiffs contend that recoupments received by the defendant through its participation in the North Carolina Motor Vehicle Reinsurance Facility (hereinafter referred to as the Facility) for the year 1979 should be included in the loss ratio calculation which would, in turn, make the loss ratio for 1979 less than 63%.

The ultimate issue on appeal is whether the trial court properly granted the defendant's motion for summary judgment. G.S. 1A-1, Rule 56(c) states that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The moving party has the burden of showing that no genuine issue of fact exists for trial. In rebuttal, the nonmovant must then set forth specific facts

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showing that a genuine issue does in fact remain. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982).

In support of its motion, the defendant offered the affidavit of Bobby W. Gray, Deputy Commissioner with the Technical Operations Division of the North Carolina Department of Insurance. Mr. Gray stated that he had personal knowledge of the defendant's 1979 Annual Statement filed with the insurance department, that the statement was accepted by the department as a correct presentation of the company's financial condition for the year 1979, and that no insurance company can deviate from the form furnished by the department to the insurance company for its completion and submission of its annual statement. Furthermore, he provided:

6. The requirements and policies of the North Carolina Department of Insurance would not allow the North Carolina Farm Bureau Mutual Insurance Company or any domestic insurance company to amend its 1979 annual statement based on receipt of recoupment fees received for the North Carolina Reinsurance Facility in the year 1980 regardless of the policy year to which all or a portion of the recoupment fees might relate.

* * * *

8. The receipt of any recoupment fees from the North Carolina Reinsurance Facility . . . must be reflected on the annual statement for the year in which they were received by the company.

In effect, the defendant was required to add in the recoupment fees received for losses incurred in 1979 on its 1980 annual statement. Otherwise, according to Mr. Gray, a substantially less accurate loss ratio figure for the year 1979 would result. He asserted that "[t]he most accurate and complete loss ratio figure . . . in the annual statement . . . is contained as a part of Form 2, Underwriting and Investing Investment Exhibit on page 9, line 31, column 8." Furthermore, in his affidavit Paul L. Mize, manager of the North Carolina Reinsurance Facility, stated that no recoupment dollars were distributed to the defendant or to the Facility's other members during the 1979 calendar year. Thus, it was impossible for recoupment fees to have changed the fact that

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the loss ratio figure exceeded 63% since the 1979 losses recouped in 1980 had to be reported in 1980 and since there were no recoupment fees distributed in 1979 to report.

In addition to Gray's affidavit, the defendant offered the affidavit of G. D. Culp, Farm Bureau's General Manager, who was familiar with the agent/agency manager contracts and was directly involved in the formulation of the 63% loss ratio limitation. Mr. Culp stated that the company loss ratio referred to in the 63% limitation "has consistently been that loss ratio contained as a part of Form 2, . . . page 9, line 31, column 8 of the annual statement to the Insurance Department." He also acknowledged that, in determining whether the 63% loss ratio limitation has been satisfied for the payment of the bonus renewal commissions, the company has used only that specified loss ratio figure "in years previous, subsequent to, and including the 1979 year."

Similarly, J. H. McMillian, the defendant's Accounting Manager, stated in his affidavit that this loss ratio figure found on Form 2, page 9, line 31, column 8 of the annual statement is the most accurate and complete loss ratio figure for an indication of the company's financial condition for any given year and is the only figure which has been used in determining whether the loss ratio has exceeded 63%. According to Mr. McMillian, "[t]he Company loss ratio as reflected in its annual statement to the North Carolina Department of Insurance exceeded sixty-three percent (63%) for the 1979 year." Thus, by the terms of the agent/agency manager agreements the company was not obligated to pay a bonus renewal commission that year.

We hold that the defendant has met its burden of showing no genuine issue of fact exists for trial. According to the terms of the plaintiffs' and plaintiff-intervenors' contracts and the accounting requirements of the Department of Insurance with regard to Facility recoupment fees, the defendant was under no obligation to pay a bonus renewal commission when its loss ratio exceeded 63% in 1979.

[2] In rebuttal, the plaintiffs and plaintiff-intervenors contend that the establishment of the North Carolina Reinsurance Facility caused such a change of circumstances to justify the application of the frustration of purpose doctrine. We must disagree. In the first place, the doctrine of frustration of purpose operates to ex-

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cuse performance of a contract, not compel performance by the other party as sued for by plaintiffs and plaintiff-intervenors in this case. Secondly, the doctrine does not apply if the parties have in their contract allocated the risk involved in the frustrating event. *See Brenner v. School House, Ltd.*, 302 N.C. 207, 211, 274 S.E. 2d 206, 209 (1981). In the present case, the loss ratio precondition was bargained for and understood. By entering into their respective agreements, the plaintiffs and plaintiff-intervenors accepted the risk that the loss ratio might exceed 63% for a given year and that their bonus renewal commissions would not be paid. In any event, the plaintiffs and plaintiff-intervenors offered no evidence that the defendant's legally required association with the Reinsurance Facility affected the company loss ratio to their detriment. Although according to Charles Kralick, certified public accountant, that if the 1979 recoupment fees had been included in the annual statement the loss ratio for that year would have been below 63%, this fact is not evidence of a causal connection between the creation of the Reinsurance Facility and the 1979 loss ratio figure exceeding 63%. Their mere assertion without the presentation of other supporting evidence that the ratio loss column in the defendant's annual statement "now means something different than before the facility was created" is insufficient to rebut the defendant's showing that no genuine issue of fact remains for trial.

[3] The plaintiffs and plaintiff-intervenors further assert that there is a genuine issue of fact as to whether the loss ratio precondition which was incorporated into many of the plaintiffs' contracts by way of amendment was supported by consideration. In support of this contention, they have offered the affidavits of two insurance agents who worked for the defendant before and after the 63% loss ratio amendment was added into their contracts in 1970. We must reject their argument on two bases. First of all, the agent/agency manager contracts were terminable at will by either party. Employment contracts which are terminable at will may be modified at any time by either party with the continuance of the relationship serving as the consideration for the modification. 56 C.J.S. *Master and Servant* Sec. 9 (1948). Therefore, no additional consideration for the amendment was needed. Secondly, the plaintiffs and plaintiff-intervenors received the bonus renewal commission for every year prior to 1979. Having

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accepted the bonus renewal commissions after the amendment became effective, they cannot now complain that the amendment was not supported by sufficient consideration. Because the plaintiffs and plaintiff-intervenors have failed to offer sufficient evidence to rebut the defendant's showing that no genuine issue as to any material fact exists for trial, we hold that the motion for summary judgment in favor of the defendant was properly granted.

Affirmed.

Judges ARNOLD and EAGLES concur.

CLIFFORD M. HARRIS, DAVID T. HAWKS, THOMAS HOULDEN, AND WIFE,
MARGARET HOULDEN v. LYDIA GRECO

No. 8321DC885

(Filed 7 August 1984)

1. Easements § 5.3— easement by necessity—sufficiency of evidence

The easement described in the parties' deeds was not express, since it was not described sufficiently to permit identification and location of the easement with reasonable certainty; nor was there an implied easement from prior use since the evidence did not show that, before the dominant and servient tracts of land were separated, the use giving rise to the easement had been so long continued and so obvious or manifest as to show that it was meant to be permanent. However, the evidence did establish an implied easement by necessity since the dominant and servient tracts were previously held in common ownership which was ended by a transfer of part of the land, and as a result of the transfer it became necessary for defendant to have the easement claimed in order to have access to her land.

2. Easements § 10— easement by necessity—location selected by dominant landowner

When an easement is granted in general terms which do not fix its location, the owner of the servient estate has the right to select the location of a way of necessity, but this location must be reasonable with respect to the rights and convenience of the party entitled to the easement; therefore, the trial court did not err in determining that the easement in question should follow a gravel road laid by defendant, owner of the dominant parcel, since evidence showed that the route selected by plaintiffs was not feasible and would involve great expense to defendant; a roadway existed over plaintiffs' land prior to the conveyances to the parties; this roadway was the only way to

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cross plaintiffs' property in a vehicle; and defendant placed a load of gravel along the old roadway on plaintiffs' land.

APPEAL by plaintiffs from *Keiger, Judge*. Judgment entered 14 January 1983 in District Court, FORSYTH County. Heard in the Court of Appeals 10 May 1984.

This action raises an issue regarding the location of defendant's easement over plaintiffs' land. We affirm the judgment of the trial court giving defendant an easement over plaintiffs' land and running along a gravel road laid by defendant.

On 1 December 1978 30.1 acres of W. B. Doub's estate were conveyed to plaintiffs. An adjoining 7.1 acres of the estate were conveyed to defendant on the same date. Plaintiffs' recorded deed contains the following language:

The foregoing property is conveyed subject to a temporary 30-foot right-of-way easement for ingress and egress from Balsom Road to the aforementioned 7.1 acre tract (defendant's property) and is to become null and void upon the dedication of a public street from Balsom Road to the said 7.1 acre tract.

Defendant's deed contains the following language:

Together with a temporary 30-foot access easement extending from the above described property across the aforesaid 30.1 acre tract to Balsom Road, said temporary easement to become null and void upon the recording of a dedication or conveyance of a permanent access to foregoing property.

Defendant also owns 10 acres which adjoin her 7.1 acre tract on the north.

On 9 August 1979 plaintiffs submitted a subdivision plan to the City-County Planning Board which contained a road from Balsom Road across plaintiffs' land and stopping approximately 200 to 300 feet from defendant's 7.1 acres. The Planning Board approved plaintiffs' plan on the condition that plaintiffs extend the road to the boundary of defendant's tract. Plaintiffs did not comply, and submitted another plan a year later. In this second plan, plaintiffs showed their property as ending several hundred feet south of defendant's land. The Board approved this plan, and the

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road proposed by plaintiffs was dedicated a public street and named Bashavia Drive. It extends from Balsom Road to a point over plaintiffs' land some 200 to 300 feet south of defendant's 7.1 acres.

In October of 1980 defendant placed a truckload of gravel over plaintiffs' land extending in a straight line from the north end of Bashavia Drive to her 7.1 acre tract. A year later plaintiffs initiated this action seeking an order compelling defendant to remove the gravel and restraining her from trespassing upon their land. Plaintiffs also prayed for compensatory and punitive damages.

In her answer defendant alleged that her deed to the 7.1 acres entitled her to an express easement across plaintiffs' property over the gravel road. In the alternative, defendant alleged that she was entitled to an implied easement arising from prior use. Defendant counterclaimed for damages as a result of plaintiffs' interference, harassment and failure to comply with restrictive covenants. Plaintiffs denied defendant's counterclaim in their reply. They admitted that defendant was entitled to an easement over their land, but alleged that they were the proper parties to determine its location.

After the evidence was submitted to the court, sitting without a jury, defendant was allowed to amend her answer to conform to the evidence. In her amended answer she elaborated upon her claim to an implied easement from prior use. She also alleged the alternative claim to an implied easement arising by necessity over the gravel road.

The trial court entered judgment decreeing that defendant was entitled to a temporary easement running from her 7.1 acre tract across plaintiffs' land to Balsom Road. The court specifically described defendant's easement as beginning where Bashavia Drive intersects with Balsom Road and continuing along Bashavia Drive and the gravel driveway laid by defendant to the southern boundary of defendant's 7.1 acre tract until there is a dedication of a public street all the way from Balsom Road to defendant's property.

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Bailey and Thomas, by George S. Thomas and James A. Gallaher, for plaintiff appellants.

White and Crumpler, by G. Edgar Parker, Daniel E. O'Toole and Randolph M. James, for defendant appellee.

ARNOLD, Judge.

In the judgment describing defendant's easement, the trial court made the following findings of fact:

VIII. George Phillips, a Winston-Salem attorney, was the Executor of an estate which owned plaintiffs' and defendant's above described tracts of land (with the exception of the 10 acre tract of land owned by the defendant). George Phillips, as Executor, was a common grantor to plaintiffs and defendant of the above described two tracts of land. George Phillips testified that a roadway or pathway for vehicles existed prior to the land being severed and that said roadway or pathway extended from Balsom Road north over the property of the plaintiffs and continued north through the property of defendant. George Phillips further testified that the said pathway or roadway was the only feasible method of traversing the property in a vehicle and that he had used the said roadway or pathway every time he had gone across the property. He further testified that it was the intent in drafting the deeds in question (which he drafted) that the defendant have a 30-foot easement from her property in a southerly direction to Balsom Road across the property of the plaintiffs and that the easement would not terminate until there was a dedication of a public street from Balsom Road all the way to defendant's 7.1 acre tract of land. He further testified that it was the intention of the parties at the time of the drafting of the deeds that defendant's 30-foot easement would be at the location of the roadway or pathway.

IX. Defendant testified that in October, 1980, she placed one truckload of gravel on the land of the plaintiffs over what she testified to be the old pathway or roadway. The gravel which defendant placed on the property of the plaintiffs extended from the above mentioned dedicated street (Bashavia Drive) to defendant's 7.1 acre tract in a straight line. George Phillips testified that the gravel placed by the defendant was

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approximately along the old roadway or pathway. Defendant also testified that a roadway extends from the southern boundary of her 7.1 acre tract of land in a northerly direction and in a straight line to two gate posts located in the northern property line of defendant's 7.1 acre tract and in the southern property line of defendant's 10 acre tract and that the roadway had existed for years. Defendant testified that the gravel which she placed across the property of the plaintiffs is in an approximate straight line from the above described roadway extending across defendant's 7.1 acre tract to the public street dedicated by the plaintiffs and that the distance of the gravel is approximately 200 to 300 feet. Defendant testified that she felt that she had no choice as to the location of her easement and as to the placing of the gravel.

X. Plaintiff, Clifford M. Harris, testified that approximately two weeks after defendant placed the gravel across the land of the plaintiffs, he placed a "no trespass" sign in the middle of the path. Defendant immediately removed the "no trespass" sign. Plaintiffs made no further objection to the gravel roadway of the defendant until the filing of this lawsuit on November 13, 1981, except for a suggestion of an alternative route to be used by the defendant. All of the parties testified that defendant has continued to travel across the gravel roadway since the placing of the gravel on the roadway. Defendant testified that the pathway along which the defendant laid the gravel is the shortest route from her property to the dedicated road (Bashavia Drive), is located on a high point of land, and is the most convenient and direct route to the road. There was evidence by plaintiffs and defendant that the land to the west of the gravel road slopes downward to the property of the defendant, but there was conflicting evidence as to the degree of the slope and whether there were any trees or obstacles in that area. The plaintiffs suggested an alternative route to the defendant which route would have been an L shaped road proceeding west from the northern point of Bashavia Drive (the dedicated street) to approximately the western boundary line of the plaintiffs' property and then in a northerly direction to the defendant's property. Defendant and her son testified

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that the alternate route was not feasible, would involve a great expense, was a much longer route, and that the gravel had already been placed and the road was already being used.

XI. Defendant testified that at no time did the plaintiffs offer any specific easement to her other than on one occasion in 1980 suggesting to her an alternative route.

. . . .

XIII. The defendant is entitled to a 30-foot wide easement from defendant's southern boundary line (of her 7.1 acres tract) across the above described 30.1 acre tract of the plaintiffs) to Balsom Road as hereinafter more particularly described in the Judgment, and defendant is entitled to said easement until there is a dedication of a public street all the way from Balsom Road to defendant's above described 7.1 acre tract.

Plaintiffs have assigned error to findings of fact XI and XIII and to bracketed portions of these remaining findings of fact on grounds that they are not supported by the evidence. We agree that there is no evidence in the record to support the last sentences in findings of fact VIII and X. However, since the remaining findings of fact are supported by ample evidence, and, in turn, support defendant's entitlement to the particularly described easement, plaintiffs were not prejudiced.

[1] Plaintiffs next argue that it was error for the trial court to enter the judgment entitling defendant to the described easement, because the facts do not support an express easement, an implied easement from prior use or an implied easement by necessity. We agree that the easement described in the parties' deeds is not express, because it is not "sufficiently certain to permit the identification and location of the easement with reasonable certainty." *Adams v. Severt*, 40 N.C. App. 247, 249, 252 S.E. 2d 276, 278 (1979). The description does not furnish any means by which the location of the proposed easement may be ascertained.

There also appears to be insufficient evidence to support an implied easement from prior use, also referred to as quasi-easement. One of the requirements of this easement is that before the dominant and servient tracts of land were separated, the use giv-

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ing rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent. See *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E. 2d 509 (1969), and Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C. L. Rev. 223 (1980). The evidence in the case on appeal does not meet this requirement. It, instead, establishes an implied easement by necessity beginning on plaintiffs' property where Bashavia Drive intersects Balsom and running northward across plaintiffs' tract along the gravel road to the southern boundary of defendant's land.

An easement by necessity is implied on proof of two elements:

first, that the claimed dominant parcel and the claimed servient parcel were held in a common ownership that was ended by a transfer of part of the land; and second, that as a result of the land transfer it became "necessary" for the claimant to have the easement.

Id. at 225.

Our Supreme Court set out principles governing implied easements by necessity in *Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971), *reversed on other grounds*, 14 N.C. App. 540, 188 S.E. 2d 679 (1972).

"[I]t is not necessary that the person over whose land the way of necessity is sought be the immediate grantor, so long as there was at one time common ownership of both tracts." (Citation omitted.) Furthermore, to establish the right to use the way of necessity, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access. (Citation omitted.)

Id. at 599, 178 S.E. 2d at 397.

When these principles are applied to the facts before us, we hold that the trial court properly found that the parties' common grantor conveyed their respective tracts with the intent to grant

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defendant an easement over plaintiffs' land; and that this easement should follow the gravel road laid by defendant.

[2] Plaintiffs correctly argue that when an easement is granted in general terms which do not fix its location, the owner of the servient estate has the right to select the location of a way of necessity. This location must be reasonable with respect to the rights and convenience of the party entitled to the easement. 25 Am. Jur. 2d, Easements and Licenses § 68 (1966). Both defendant and her son testified that the route selected by plaintiffs was not feasible and that it would involve a great expense to defendant. A common grantor of the parties' land testified that a roadway existed prior to the conveyances to the parties; that this roadway extended from Balsom Road north over plaintiffs' property and continued through defendant's property; that this roadway was the only way to cross plaintiffs' property in a vehicle and that he had used the road every time he travelled across the property. Defendant testified that in October of 1980 she placed a load of gravel extending from Bashavia Drive northward along the old roadway on plaintiffs' land.

Since plaintiffs' alternate route was not feasible to defendant and since there was evidence that the gravel road was the only way to reach defendant's land by vehicle from the public road, the judgment entitling defendant to a temporary easement over the gravel road is affirmed.

Plaintiffs' final assignment of error involves the trial court's exclusion of defendant's answer to a question posed during re-cross-examination. "When evidence is excluded, the record must sufficiently show what the purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal." 1 Brandis on North Carolina Evidence § 26 (2nd rev. ed. 1982). Since the answer which defendant would have given was not placed in the record, plaintiffs' assigned error will not be considered on appeal.

Affirmed.

Judges HEDRICK and PHILLIPS concur.

Wyatt v. Wyatt

BOBBY WYATT v. GERALDINE WYATT

No. 8323SC658

(Filed 7 August 1984)

1. Courts § 3— proceeding not considered by clerk—jurisdiction of superior court

Superior Court judges had jurisdiction of this special proceeding to partition and sell real estate which had not been considered or passed on by the Clerk of Superior Court, as provided for by G.S. 1-393 *et seq.*

2. Partition § 1.2— possession of property given to wife—no right of husband to partition

In ordering the sale of real property and division of proceeds therefrom between the parties, the Superior Court failed to accord the prior judgment of the District Court the effect that its terms and the law required, since the prior judgment provided that appellant was given possession of the house and its contents and that "she foregoes any other remedy save and except at the time of the divorce if, in fact, the parties are divorced, the title to the real estate," and appellee therefore had no right to have the property sold.

Judge HEDRICK concurring in the result only.

APPEAL by respondent from *Collier, Judge*. Order entered 2 April 1983 in Superior Court, WILKES County. Heard in the Court of Appeals 10 April 1984.

When the parties married in 1973, appellant was the sole owner of the house where she and her child by a previous marriage lived. After the marriage appellee moved in with them and some time later deeds were executed which put record title to the real property in the names of both parties. In December, 1978 the parties separated and in January, 1979 appellant sued appellee in Wilkes County District Court for alimony, for possession of the real estate, and to nullify his apparent title interest in the property. In his answer, appellee denied appellant was entitled to any relief at all, alleged that because of a disability he was dependent upon her, and asked that he be awarded alimony and possession of the house. On 13 February 1979, the following consent judgment, executed by the court, the parties, and their lawyers, was filed in that action:

IT APPEARING to the Court that the parties hereto have agreed to settle and compromise this action and that no hearing will be necessary at this time in this cause; and it appear-

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ing to the court that the settlement of the controversy is as set forth in the paragraph hereinafter set out.

IT IS NOW, THEREFORE, CONSIDERED AND ORDERED that the plaintiff, Geraldine Wyatt, be and she is hereby given a writ of possession to the dwelling house described in the pleadings along with its contents and that she foregoes any other remedy save and except at the time of the divorce if, in fact, the parties are divorced, the title to the real estate.

Each party shall bear his or her own cost at this time.

On 24 July 1980, in another Wilkes County District Court action, the parties were divorced. And in August, 1980, this special proceeding to partition and sell real property and a boat, allegedly owned by the parties as tenants in common, was filed in the Wilkes County Superior Court. The real property involved in this proceeding is the house and lot referred to in the prior action and appellant immediately filed a motion to dismiss the proceeding on the ground that the prior action between the parties was still pending and that the ownership of the real estate involved was being contested therein. On 27 May 1981, this motion was heard and denied by Superior Court Judge James M. Long, who also allowed appellant twenty days within which to answer the petition for partition; but no answer has been filed. In April, 1983, Judge Collier granted appellee's motions for judgment on the pleadings and for summary judgment and ordered that both the real property and the boat be sold and the net sale proceeds divided equally between the parties. The appeal before us now is from that order. The petition caption reads in the "District Court Division," rather than in the "Superior Court Division Before the Clerk," but the proceeding has not been considered or processed in any way by the District Court Division, nor has it been considered or passed on by the Clerk of Superior Court.

Franklin Smith for petitioner appellee.

Hall & Brooks, by John E. Hall and William F. Brooks, for respondent appellant.

PHILLIPS, Judge.

[1] The first question that the record gives rise to is whether the Superior Court judges who denied appellant's motion to dis-

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miss and granted appellee's motions for summary judgment and judgment on the pleadings had jurisdiction of this special proceeding to partition and sell real estate which has not been considered or passed on by the Clerk of Superior Court, as G.S. 1-393, *et seq.* provides. We hold that they did. Under G.S. 7A-40, the Clerk of Superior Court in the exercise of "judicial powers conferred upon him by law in respect of special proceedings and the administration of guardianships and trusts, is a judicial officer of the Superior Court Division, and not a separate court." And G.S. 7A-257 provides that when an action is docketed in an improper division of our unified court system that: "Failure of a party to move for transfer within the time prescribed is a waiver of any objection to the division, except that there shall be no waiver of the jurisdiction of the superior court division in probate of wills and administration of decedents' estates." And G.S. 7A-258 provides that any party can move to transfer an improperly docketed "civil action or special proceeding" to the proper division. These provisions indicate that the failure of the Clerk to pass on special proceedings is no longer jurisdictional, as it apparently was before Chapter 7A of the General Statutes, enacted in 1965, became effective. *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980). In this instance, though miscaptioned, the proceeding has been within the jurisdiction of the Superior Court Division from the outset; and the Clerk's failure to consider the proceeding, though irregular, has had no effect whatever on the case or the parties either, since the questions raised had to be decided by a judge in any event.

[2] In contending that the order to sell the real estate was entered contrary to law, appellant argues that the order stripped "the District Court of its properly exercised jurisdiction" in the prior case. While we do not view the matter in precisely that drastic light, we are of the opinion that in this proceeding the Superior Court failed to accord the prior judgment of the District Court the effect that its terms and the law required. Though, as a consent judgment in a marital case, it may be subject to revision by the court that entered it, until so revised it stands as both an adjudication and a contract that the law is bound to enforce. *Stancil v. Stancil*, 255 N.C. 507, 121 S.E. 2d 882 (1961). By its terms, though unusually brief for a legal document contributed to by two lawyers, a contested lawsuit over marital rights and property was

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settled and three things were agreed to and ordered, two of which control or affect the rights of the parties in this proceeding. *First*, it was agreed and ordered for appellant to have possession of the house and its contents. Since the provision does not limit her possession, either by time or otherwise, and can only be changed by the court that rendered the judgment or by agreement of the parties, it necessarily means that: (1) Appellant's right to possess the real estate will continue until such time, if any, as the court orders or the parties agree otherwise; and (2) until her right to possess the real estate is lost or terminated by one means or another, no other court can order the real property to be sold at appellee's request, since to do so would impermissibly abrogate the right appellant has under the previously entered judgment to continue in possession of it. *Second*, it was agreed and ordered that every legal remedy that appellant then had against appellee, except the one seeking to establish her ownership of the real estate, was being surrendered. The words "foregoes any other remedy," save the one exception stated, are too specific and extensive to be interpreted otherwise. *Third*, it was agreed and ordered that as to appellant's possible remedy to establish her sole ownership of the real estate, that it would be exercised "at the time of the divorce," if there was one. Before the judgment was entered, appellant had the unqualified right to exercise that legal remedy or leave it in indefinite abeyance as she saw fit; but under this provision of the judgment, that right was surrendered. The right was surrendered, apparently, because this was the only major unresolved issue between the parties and they deemed it in their best interest to require its resolution at some definite time. Nevertheless, we do not believe that the provision required appellant to exercise her remedy in regard to ownership of the real estate the very day that the divorce was obtained; but it did require her to do so, if at all, we think, within a reasonable time thereafter. Since the divorce was obtained more than three years ago, and no steps have yet been taken by appellant to exercise or pursue her remedy as to the claimed ownership of the property, that remedy is also foregone under the plain terms of the agreement and judgment and cannot be asserted or pursued hereafter.

Though the terms of the judgment and agreement are rather unusual and their disadvantageous effect on each of the parties

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may not have been fully appreciated at the time, they are the terms that the parties agreed to and the court ordered, and as such they must be enforced. The effect of these judgment and contract terms on this proceeding is both plain and profound. Since appellee has no right to have the property sold, the order to sell it cannot stand and must be reversed; and that part of appellee's petition must be dismissed, though without prejudice to his right to refile it upon appellant's right to possess said property being lost, either by a modification of the consent judgment, agreement of the parties, or otherwise.

But the consent judgment has no effect on appellee's right to have the motorboat described in the petition sold, and the court's order directing that the boat be sold is herewith affirmed.

Reversed in part; affirmed in part.

Judge ARNOLD concurs.

Judge HEDRICK concurs in result only.

Judge HEDRICK concurring in the result only.

Since the majority reverses the judgment and orders a dismissal of that part of the petition regarding the real estate, it is inappropriate for this Court to undertake to chart the course for the lawyers and their clients as to the resolution of any problems resulting from any prior legal proceedings. In my opinion the majority has gone too far in its efforts to interpret and explain the ambiguities in the consent judgment entered on 13 February 1979, and its statements ought not to be binding in any future proceedings between the parties. Moreover, I believe the majority has given too little attention to the procedural quagmire in which this case and the appeal wallows. Nevertheless, I concur in the result because it affords the parties an opportunity to litigate, if they desire, the critical questions arising out of any ambiguities present in the consent judgment.

Sipfle v. Bd. of Governors of UNC

LOUISE A. SIFPLE v. THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, AND THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 8320SC867

(Filed 7 August 1984)

Principal and Agent § 4— promotion of China tour—faculty member not agent of university

Defendant university did not hold a faculty member out as its agent in organizing a trip to China, though defendant provided the faculty member with stationery bearing defendant's letterhead, since the faculty member violated university policy in using the stationery to promote a private venture, and plaintiff therefore could not hold defendant liable when the venture failed and plaintiff lost a considerable sum of money.

APPEAL by plaintiff from *Helms, Judge*. Judgment entered 6 May 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 8 May 1984.

This is an action in which the plaintiff contends the University of North Carolina at Chapel Hill is liable to her in the amount of \$52,264.00. She bases her claim on what she contends were acts of the University in leading her to believe that the "full faith and credit of the University was behind" a tour of China for which she had made payments. She also contends that the University had clothed Dr. Lawrence Kessler, a member of the faculty, with apparent authority so that the University was liable for the acts of Dr. Kessler.

The defendants made a motion for summary judgment. The pleadings and papers filed in support of and in opposition to the motion show the following facts are not in dispute. In the spring of 1981, Travel Headquarters, Inc., a California travel agency, mailed to college faculty members throughout the United States circulars describing tour packages it intended to offer in the summer of 1982. Travel Headquarters solicited the faculty members to act as guides for tours. Dr. Lawrence Kessler agreed to lead a tour of China. He entered into an agreement with the travel agency in which he agreed to recruit people for the tour. He was to receive a number of free passages on the tour or money depending upon the number of people he recruited.

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In order to promote the tour, the travel agency furnished a "shell" to Dr. Kessler who then "personalized" it by adding a title at the top of the shell and attaching an introductory letter which he signed. Dr. Kessler gave the tour the title "Carolina Study Tour." The travel agency then had a brochure printed for distribution to potential customers.

The plaintiff received a copy of the brochure for the "Carolina Study Tour." She decided to register for the tour and take 15 members of her family with her. On 24 January 1982, she mailed a check for \$2,500.00 to Dr. Kessler at Hamilton Hall, University of North Carolina at Chapel Hill. On 1 February 1982, she mailed a check for \$40.00 to Dr. Kessler to enroll in History 84 which was being offered for credit by the UNC Extension Division in conjunction with the tour. The plaintiff received a letter from Marcia Decker, Student Services, Off-Campus Credit Programs, stating that she was delighted that plaintiff planned to participate in the China study travel program and enroll for History 84.

The plaintiff, following instructions from Dr. Kessler, sent further sums of money totalling \$49,764.00 to Travel Headquarters, Inc. in California. All letters written by Dr. Kessler to the plaintiff were on stationery of the University. It was a violation of University policy for Dr. Kessler to use the University's letterhead to promote a private venture. Dr. Kessler wrote the plaintiff on 18 May 1982 informing the plaintiff that the trip had been cancelled. Travel Headquarters, Inc. went into bankruptcy. No money has been refunded to the plaintiff.

The superior court granted the defendants' motion for summary judgment. The plaintiff appealed.

Pollock, Fullenwider, Cunningham and Patterson, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for defendant appellees.

WEBB, Judge.

The plaintiff has alleged (1) that the defendants made an implied warranty to her that Travel Headquarters, Inc. was worthy

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of her confidence; (2) that the representation to plaintiff by the University constituted an implied contract between plaintiff and the University; (3) that she relied on the representations to her detriment; (4) that the University was negligent in not knowing of the Carolina Study Tour and not having in effect policies and procedures to prevent its name from being associated with the tour; (5) the University clothed Dr. Kessler with apparent authority to contract for it; and (6) the defendants were sureties for Travel Headquarters, Inc.

In her first argument the plaintiff does not say under which theory she is claiming but she contends that she was led by acts of the University to believe that the Carolina Study Tour was sanctioned by the University and that based on such reliance, she lost \$52,264.00 to Travel Headquarters, Inc. She contends that the University knew of Dr. Kessler's plans and by participating in them gave endorsement to the tour. The plaintiff concedes she can find no case in this state which is precedent for this case.

Assuming the plaintiff would have a claim under the theory she advances we hold the evidence in this case shows she is not entitled to recover. Dr. Kessler, a member of the faculty of the University, used stationery with the University's letterhead in promoting the tour. Payments for the tour were made to a California travel agency. We do not believe a person could conclude from this that the University endorsed the tour and guaranteed the solvency of the travel agency. Nor do we think that the fact the University offered academic credit for those who took a course while on the tour makes it a guarantor of the solvency of the travel agency.

The plaintiff also contends the University allowed Dr. Kessler to act as its apparent agent. In *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974), our Supreme Court stated:

"The rights and liabilities which exist between a principal and a third party dealing with that principal's agent may be governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses;"

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Id. at 30-1, 209 S.E. 2d at 799. In this case, the University has provided a member of the faculty with stationery containing the University's letterhead. We do not believe this is holding him out as an agent to represent the University in organizing a trip to China. We do not believe the University should be held liable because Dr. Kessler violated University policy in using University stationery to promote a private venture.

Affirmed.

Judges HILL and WHICHARD concur.

LINDA J. CAPPS v. WILLIAM C. CAPPS

No. 8328DC795

(Filed 7 August 1984)

Divorce and Alimony § 21.9— equitable distribution of marital property

The trial court erred in failing to make an equitable distribution of the marital property of the parties upon defendant's proper demand therefor. G.S. 50-20(f); G.S. 50-21(a).

APPEAL by defendant from *Fowler, Judge*. Judgment entered 11 October 1982 in District Court, BUNCOMBE County. Heard in the Court of Appeals 3 May 1984.

The parties married in 1966 and separated in May, 1981. In December, 1981, plaintiff, alleging adultery and cruelty, sued for alimony, custody of their four children, possession of the family home, and support for the children; and before answer was filed, a *pendente lite* order was entered awarding plaintiff alimony of \$100 a month, custody of the children, possession of the house, \$300 a month child support, and requiring defendant to also pay the house mortgage payments in the amount of \$300 a month, and to pay \$250 on plaintiff's attorney's fees. Defendant later answered and counterclaimed for custody and possession of the house, alleging plaintiff's abandonment; and in a subsequent action in the same court, defendant sued plaintiff for an absolute divorce and equitable distribution of the marital property. Plaintiff admitted all the allegations in the divorce complaint and the

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decree was granted on June 24, 1982; but the equitable distribution claim was left open pending the determination of plaintiff's right to permanent alimony in this case. On 21 September 1982, following a trial, the jury found that defendant had committed adultery; and on 28 September 1982 the judge held a hearing on the alimony and equitable distribution issues. Incident thereto, the parties listed the articles each or both owned and the value of some of them; and they agreed, by consent judgment, filed with and approved by the court, that except for a car that each party owned, the other articles owned by them were owned equally. The judge then entered a permanent alimony and child support order that was the same as the *pendente lite* order except that defendant was required to pay an additional \$300 on the fee of plaintiff's attorney. But no order of equitable distribution was made.

Riddle, Shackelford & Hyler, by John E. Shackelford, for plaintiff appellee.

C. David Gantt for defendant appellant.

PHILLIPS, Judge.

The trial court's failure to equitably distribute the marital property of the parties requires the vacation of the permanent alimony and child support order appealed from and the return of this matter to the Buncombe County District Court for further proceedings in compliance with the Equitable Distribution Act. Under that Act, when a party to a divorce action seeks equitable distribution, the trial judge is required to accomplish it upon the divorce being entered. G.S. 50-20(f) provides:

The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

G.S. 50-21(a), in pertinent part, provides:

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Upon application of a party to an action for divorce, an equitable distribution of property shall follow a decree of absolute divorce.

The mandate could not be clearer or less equivocal. Equitable distribution, when properly demanded, must be granted upon the divorce decree being entered; and if alimony and child support has not been previously awarded, equitable distribution must be made first; but if alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it.

The court's failure to accomplish equitable distribution may have been due to its impression that the marital property was being distributed between the parties by mutual written agreement, which our law still permits either "[b]efore, during or after marriage." G.S. 50-20(d). But the consent judgment supposed to accomplish distribution merely recites that:

1. That all of the property owned by the Plaintiff and the Defendant is equally owned by both parties, with the exception of the automobiles, and the Plaintiff shall have the Buick automobile which is in his possession and the Defendant shall have the automobile that is in her possession.

Except for the two automobiles referred to, this agreement and judgment did not accomplish a distribution of the property that the parties owned; which, according to the record, includes three other automobiles, a four bedroom home worth about \$75,000, various articles of household furniture and equipment, and some jewelry and guns. It merely established that the properties just referred to are owned equally by the parties. Whereas, to equitably distribute property, as the Act makes plain, it is necessary to at least (1) identify the property owned; (2) evaluate it; and (3) order its distribution. The identification and evaluation of their property can readily be completed by the court from the evidence now before it; but the distribution of it has not yet been attempted. In making the mandated distribution it will, of course, be necessary for the court to consider the matters and make the

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findings required by the Act. And after that is done, the plaintiff's needs for alimony and child support and the defendant's ability to pay them will have to be re-evaluated as the Act requires.

Vacated and remanded.

Judges HEDRICK and ARNOLD concur.

DANNY G. FISHER, ET AL. v. BUREAU OF INDIAN AFFAIRS, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8330SC518

(Filed 7 August 1984)

Master and Servant § 108—unemployment compensation—"furlough" during summer—no right to compensation

If unemployment benefits are based on service to a secondary school and the applicant has a contract for services to the school for two successive academic years, the applicant is not eligible for unemployment benefits during the period between the two academic years, it being irrelevant whether applicant is employed by a secondary school or by the Bureau of Indian Affairs to teach in a secondary school; moreover, an applicant is not removed from this provision because he is not employed by a secondary school with regular summer vacation periods but is employed on a twelve-month basis and is furloughed for the two summer months because of budgetary restraints. G.S. 96-13(b)(2).

APPEAL by claimants from *Thornburg, Judge*. Judgment entered 3 January 1983 in Superior Court, JACKSON County. Heard in the Court of Appeals 16 March 1984.

This is an appeal from a judgment of the superior court affirming an order of the Employment Security Commission. Mr. Fisher and others filed claims for unemployment insurance benefits. They were denied benefits and an appeals referee conducted a hearing after which he affirmed the denial.

The claimant appealed to the Employment Security Commission which made findings of fact that each of the claimants is a federal employee and performs work for the Cherokee School. Due to "budgetary restraints," each of the claimants was furloughed after 21 June 1982 but was to return to work with the

Fisher v. Bureau of Indian Affairs

Cherokee School after 16 August 1982. Cherokee School is a secondary school and each of the claimants' work "is typical school-related work, as teachers, as guidance counsellors, etc." The Employment Security Commission held that none of the claimants were entitled to any benefits during the furlough period.

The claimants appealed from the judgment of the superior court.

Hunter, Large and Kirby, by William P. Hunter, III, for claimant appellants.

Kathryn S. Aldridge for appellee Employment Security Commission of North Carolina.

WEBB, Judge.

The claimants do not challenge the findings of fact of the Employment Security Commission. They contend that it committed error in its conclusions that they were not entitled to benefits. We affirm the judgment of the superior court. G.S. 96-13(b)(2) in effect at the time this claim was filed provided in part:

"The payment of benefits to any individual based on services for secondary schools . . . shall be in the same manner . . . as apply to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in instructional, research or principal administrative capacity in a secondary school . . . benefits shall be payable based on such services for any week commencing during the period between two successive academic years . . . only if the individual does not have a contract . . . to perform services in any such capacity for any secondary school for both such academic years"

As we read this statute, if unemployment benefits are based on service to a secondary school and the applicant has a contract for services to the school for two successive academic years, the applicant is not eligible for unemployment benefits during the period between the two academic years. This is what the facts are as to Danny G. Fisher and the other claimants.

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The claimants point out they were not employed by a secondary school but by the Bureau of Indian Affairs. Relying on the statutory definition of a secondary school as an "employer" subject to Chapter 96, they contend that since they were not employed by a secondary school, they are not subject to G.S. 96-13(b)(2). We do not believe G.S. 96-13(b)(2) is concerned with who employs a claimant. The section contained the words "based on services for secondary schools." Although the claimants were employed by the Bureau of Indian Affairs, they served a secondary school and this placed them within the terms of G.S. 96-13(b)(2).

The claimants also argue that sections of the Employment Security Law imposing disqualifications for its benefits should be strictly construed in favor of the claimants. They contend that the "secondary school provision" of the law was intended to prevent those regularly employed by the public schools from drawing unemployment compensation during vacation periods. They argue that because they were not employed by a secondary school with regular vacation periods but were employed on a twelve-month basis and were furloughed because of budgetary restraints, the exception does not apply to them. We believe the exception applies without ambiguity to the claimants and we are bound by the statute.

Affirmed.

Judges BECTON and EAGLES concur.

Perry v. Cullipher

VIRGIN PERRY, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATE v. CHARLIE CULLIPHER, INDIVIDUALLY; DOUGLAS BURNETTE, INDIVIDUALLY; CHARLIE SPRUILL, INDIVIDUALLY; EARL SPRUILL, INDIVIDUALLY, AND D/B/A PUNGO DRAINAGE CO.; AND SAWYER'S LAND DEVELOPING, INC.

No. 836SC395

(Filed 7 August 1984)

1. Cemeteries § 3; Appeal and Error § 6.2; Rules of Civil Procedure §23—desecration of graves—denial of certification as class action—appealability

Where plaintiff alleged that defendants negligently desecrated numerous graves in a cemetery while clearing land on an adjoining farm and he alleged that he had a child buried in the cemetery, the trial court's order holding that the action was not maintainable as a class action was interlocutory but nevertheless appealable; however, the trial court did not abuse its discretion in denying certification of this case as a class action.

2. Cemeteries § 3— desecration of graves—stillborn child—definition of grave

In an action to recover for the desecration of graves, a "grave" includes a place containing the remains of a stillborn child.

APPEAL by plaintiff from *Strickland, Judge*. Order entered 15 November 1982 in Superior Court, BERTIE County. Heard in the Court of Appeals 7 March 1984.

The plaintiff appeals from an order denying certification of this action as a class action. In his complaint the plaintiff alleged that he has a stillborn child buried in a burial ground known as Sandhill Cemetery. He alleged further that the defendants negligently desecrated numerous graves in the cemetery while clearing land on an adjoining farm. He alleged that he brought the action on behalf of all persons similarly situated pursuant to G.S. 1A-1, Rule 23. The defendants made a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) and for an order determining this action is not maintainable as a class action.

The superior court denied the defendants' motion to dismiss and held that the action is not maintainable as a class action. The plaintiff appealed and the defendants cross-assigned error.

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Law Firm of Carter W. Jones, by Carter W. Jones, Charles A. Moore, and Kevin M. Leahy, for plaintiff appellant.

Baker, Jenkins and Jones, by Ronald G. Baker, Robert C. Jenkins and W. Hugh Jones, Jr.; and Gillam, Gillam and Smith, by Lloyd C. Smith, Jr., for defendant appellee Charlie Cullipher.

Pritchett, Cooke and Burch, by William W. Pritchett, Jr., for defendant appellees Charlie Spruill, Earl Spruill and Pungo Drainage Company.

Leroy, Wells, Shaw, Hornthal and Riley, by L. P. Hornthal, Jr., for defendant appellees Douglas Burnette and Sawyer's Land Developing, Inc.

WEBB, Judge.

[1] The first question posed by this appeal is whether it should be dismissed as premature. The order holding that the action is not a class action does not determine the controversy and is interlocutory. The plaintiff argues that he is entitled to appeal under the substantial right exception of G.S. 1-277 and G.S. 7A-27(d)(1). An interlocutory order is appealable if it affects a substantial right and will work injury to the appellants if not corrected before final judgment. *Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977). If the court erred in refusing to certify this as a class action, Virgin Perry has not been injured. He can get his judgment without the other members of the class. G.S. 1A-1, Rule 23 provides that in some cases class actions are proper. Because the rule provides for members of a class to be represented by one of the class, we believe their right to this representation makes a consideration of their rights necessary when considering whether an order refusing to certify the class may be appealed. If Virgin Perry recovers after the trial court has refused to certify the action, the other members of the class will suffer an injury which could not be corrected if there were no appeal before the final judgment. The judgment in his favor could be affirmed and they would not recover anything. We hold that the order is appealable. The defendants cite *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed. 2d 351 (1978), which holds that the refusal to certify a class is not appealable. The test for appealability of an interlocutory order in the federal courts is different from our test. We do not believe the case is applicable.

Perry v. Cullipher

In determining whether it was error to deny certification of this case as a class action, we note that this is a tort case. There has been some reservation expressed as to allowing tort cases to be certified as class actions. See 7A Wright & Miller, Federal Practice and Procedure: Civil § 1783 (1972). In this case, the damages consist largely of mental suffering by those who have had the graves of loved ones desecrated. The damages may vary a great deal among the parties. It is within the discretion of the trial judge as to whether an action should be certified as a class action and we hold the court did not abuse its discretion in this case. See *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979) for the factors to be considered in determining whether to certify a case as a class action.

[2] In their cross-assignment of error, the defendants argue that because the plaintiff alleged that the grave of the plaintiff's stillborn child was disturbed, the action should have been dismissed. They contend that because there is no right of action for the wrongful death of an infant not born alive, *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E. 2d 382, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 623 (1975), there is no right of action for the desecration of the grave of a stillborn child. They say that a grave has to contain the body of a deceased person and a stillborn infant is not a deceased person. For this reason, it was not a grave that was desecrated. The gravamen of an action for the desecration of a grave is not the same as that for wrongful death. It is for mental suffering for the disturbance of the final resting place for a loved one. This mental suffering can be just as real for a stillborn child as for a deceased person. Whatever the definition of a grave in some other context, we believe in the context of this action a grave includes a place containing the remains of a stillborn child. It was not error to deny the motion to dismiss.

Affirmed.

Judges BECTON and EAGLES concur.

Dorton v. Dorton

RONALD W. DORTON v. BARBARA S. DORTON

No. 8319DC853

(Filed 7 August 1984)

Divorce and Alimony § 24— paternity previously established—blood tests improperly ordered

The trial court erred in ordering that defendant and her two children submit to blood grouping tests for the purpose of determining whether plaintiff was the father of the children, since plaintiff, by his own verified complaint filed thirteen years ago, alleged that the children were born of his marriage to defendant; defendant admitted plaintiff's parentage allegation so that there was no issue with regard thereto; that plaintiff was the father of the children was judicially determined by a child custody and support order entered thirteen years ago; and by complying with the terms of several orders based on plaintiff's paternity and otherwise acknowledging his paternity both directly and indirectly for many years, plaintiff was estopped to contend otherwise.

APPEAL by defendant from *Warren, Judge*. Order entered 9 June 1983 in District Court, CABARRUS County. Heard in the Court of Appeals 8 May 1984.

Plaintiff filed this suit for absolute divorce in June, 1971, alleging that two children, Jeffrey Dale Dorton and Dawn Michelle Dorton, were born of the marriage. By her answer the defendant admitted all of the allegations in the complaint and, after further alleging her fitness to look after the children and plaintiff's ability to support them, asked the court to place the children in her custody and require plaintiff to contribute to their support. In July, 1971, the divorce was granted and an order entered giving defendant custody of the two children and requiring plaintiff to pay \$70 a month for their support. In December, 1972, by appropriate order, the support payments were increased to \$100 a month and plaintiff was also directed to maintain insurance for the children's hospital and medical expenses. In June, 1982, alleging that the children's expenses and plaintiff's earnings had both increased substantially during the preceding ten years, defendant moved that the support payments be increased also. In September, 1982, defendant further moved that plaintiff be adjudged in contempt of court for being \$425 behind in his support payments and for failing to maintain medical and hospital insurance for the children. At that time a \$2,248 hospital bill for one of the children was outstanding and neither plaintiff nor his

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carrier was taking any steps to pay it. Following a hearing on the two motions, an order was filed 17 December 1982. It found that plaintiff's insurance did cover the child's hospital bill or most of it, directed him to pay any part of the bill that his insurance company did not pay, and required him to thereafter pay \$275 a month toward the children's support. Plaintiff gave notice of appeal from that order, but the appeal was not perfected.

On 7 February 1983 plaintiff moved that an order be issued requiring defendant and the two children to submit to blood grouping tests for the purpose of determining the paternity of the two children. In support of the motion plaintiff contended therein that blood grouping tests made when this suit was filed twelve years earlier, and which showed that plaintiff could be the children's father, had been replaced by tests that are more accurate and reliable. Pursuant to this motion an order was entered on 9 June 1983 directing defendant and the two children to submit to blood grouping tests for the purpose of determining whether plaintiff is the father of either of said children. The appeal now before us is from this order.

Irvin, Irvin & Pickett, by R. Wayne Pickett, for plaintiff appellee.

Williams, Boger, Grady, Davis and Tuttle, by John R. Boger, Jr., for defendant appellant.

PHILLIPS, Judge.

The court had no authority to issue the order appealed from and it is hereby reversed and set aside. G.S. 8-50.1 authorizes judges to order blood grouping tests only in cases "in which the question of parentage arises." The parentage of the two children involved in this case is no longer an open question. It was long since set at rest in more ways than one. In the first place, by his own verified complaint filed thirteen years ago, plaintiff alleged that the two children were born of his marriage to the defendant. This allegation having been neither withdrawn, amended, nor otherwise altered, it is conclusive of the facts alleged and he is bound thereby. *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E. 2d 176 (1952). In the second place, since defendant admitted plaintiff's parentage allegation, it is fundamental

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that no issue with respect thereto can arise and evidence relating thereto is irrelevant, because it can serve no proper purpose in the litigation. *Wilson v. Chandler*, 235 N.C. 373, 70 S.E. 2d 179 (1952). In the third place, that the plaintiff is the father of these two children was judicially determined by the order entered on 27 July 1971 and this part of the order having been neither attacked nor modified, it is *res judicata* as to the contention raised by plaintiff's motion. *Williams v. Holland*, 39 N.C. App. 141, 249 S.E. 2d 821 (1978). In the fourth place, by acceding to the terms of the several orders based on plaintiff's paternity and otherwise acknowledging both directly and indirectly for many years that he is the father of these children, plaintiff is now estopped to contend otherwise. *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E. 2d 22 (1981). Finally, permitting plaintiff at this late date to disturb the stability of these children and cast a cloud on their legitimacy upon this record would be contrary to public policy.

The order appealed from is reversed.

Reversed.

Judges HEDRICK and ARNOLD concur.

CATHERINE B. NEAL v. DAVID WAYNE NEAL

No. 8310DC653

(Filed 7 August 1984)

Divorce and Alimony § 23.5— visitation rights—child in another state—jurisdiction

Where the parties and their minor child were residents of Wake County when the trial court entered its order which awarded custody to defendant, made no provision for plaintiff's visitation, and reserved the right to determine plaintiff's visitation later when her health improved and she petitioned the court, the Wake County District Court had jurisdiction to consider plaintiff's motion for the allowance of visitation rights filed 4½ years later at a time when defendant and the minor child lived in Georgia.

APPEAL by defendant from *Bullock, Judge*. Order entered 30 March 1983 in District Court, WAKE County. Heard in the Court of Appeals 10 April 1984.

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The parties, married in 1974 and separated in 1979, have one child and this action was brought for his custody and support. When the action was filed, plaintiff had actual custody and both parties and the child were Wake County residents; and by answer defendant admitted that both parties were fit to have custody and visitation. Following a hearing, an order was entered on 11 September 1979 awarding custody to defendant; but the order made no provision for plaintiff's visitation, which was left for determination later because of certain physical and emotional ailments that she then had and was being treated for. The order provided as follows:

2. That this cause is retained for further Orders of this Court in regard to visitation with said minor child by the Plaintiff and the Plaintiff may petition the Court at any time for specific visitation.

In July, 1980, defendant and the child moved to Georgia where they have lived ever since. On 16 February 1983, by motion, plaintiff asked the court to enter an order establishing her visitation privileges. Defendant moved to dismiss plaintiff's motion for lack of jurisdiction, and appealed from an order denying his motion.

Marshall & Solomon, by William E. Marshall, for plaintiff appellee.

Ragsdale, Kirschbaum & Day, by William L. Ragsdale and Kathy A. Klotzberger, for defendant appellant.

PHILLIPS, Judge.

The sole question presented for determination is whether the Wake County District Court has jurisdiction to consider plaintiff's motion for the allowance of visitation with her child. Obviously, it has. Authorizing visitation by a parent is part of the child custody awarding and controlling process; and that the court had jurisdiction when it awarded defendant custody of the child and reserved the right to determine plaintiff's visitation later is self-evident, and not disputed. Defendant's contention that the jurisdiction of the court was lost when he and the child moved to Georgia is without merit. Jurisdiction once acquired is generally not divested by subsequent events. 21 C.J.S. *Courts* § 93 (1940). "For once jurisdiction of a court attaches it exists for all time until the

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cause is fully and completely determined." *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E. 2d 469, 476 (1958); also *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979). Since this principle applies even in the absence of an express reservation of power by the court to complete a determination undertaken, we certainly cannot hold that the principle is unavailable where the power to complete the adjudication was expressly reserved. Furthermore, defendant having obtained custody of the child by the very order that reserved unto the court the power to consider plaintiff's visitation motion, he is estopped to deny the court's jurisdiction to comply therewith; since no action concerning the child is pending in Georgia, requiring plaintiff to file suit there now in order to visit her child would unnecessarily multiply litigation, which the law does not favor; and the court, having expressly invited plaintiff to petition for visitation privileges when her health improved, should keep its commitment, even as litigants are required to do.

Holland v. Holland, 56 N.C. App. 96, 286 S.E. 2d 895 (1982), strongly relied upon by defendant, has no application. In that case, which involved an original custody application for a child that had lived out-of-state for six years, the only basis for jurisdiction was the Uniform Child Custody Jurisdiction Act, G.S. 50A-1, *et seq.*, the conditions of which were not met for the reasons set out in the court's opinion. Whereas, in this case, the court unquestionably had custody jurisdiction from the filing of the action onward under G.S. 7A-244 and G.S. 50-13.1, *et seq.* and while so endowed with jurisdiction expressly reserved the power to consider the request that has now been made.

Affirmed.

Judges HEDRICK and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 JULY 1984

FORD MOTOR CREDIT CO. v. HART No. 8321DC898	Forsyth (81CVD2780)	Affirmed
HARRIS v. HARRIS No. 8321DC1000	Forsyth (78CVD3862)	Affirmed
PHILLIPS v. TOWN OF LAKE LURE No. 8329SC1273	Rutherford (82CVS345)	Affirmed
POSTON v. POSTON No. 8322DC1334	Iredell (74CVD2990)	Affirmed
STATE v. BENFIELD No. 8322SC1281	Iredell (83CVS676)	Affirmed
STATE v. FREEMAN No. 8319SC1297	Montgomery (83CRS2416) (83CRS2420)	No Error
STATE v. HOOD No. 8425SC50	Catawba (83CRS1468)	No Error
STATE v. JACKSON No. 8412SC39	Cumberland (82CRS46136)	No Error
STATE v. PICKLER No. 8319SC1328	Rowan (83CRS9812)	No Error
STATE v. SEABERRY No. 8311SC1031	Harnett (82CRS7453) (82CRS7454)	New Trial
STATE v. STAFFORD No. 8410SC12	Wake (82CRS50786)	No Error

FILED 7 AUGUST 1984

BRANCH v. STEARNES No. 8330SC1279	Haywood (82CVS78)	Modified & Affirmed
BRITT v. SCARBORO No. 8328SC970	Buncombe (82CVS222)	Affirmed
HORTON v. NATIONWIDE MUTUAL INS. No. 848DC8	Wayne (81CVD2378)	Affirmed

JACOBS v. CROWDER CONSTRUCTION CO. No. 8310IC947	Industrial Commission (H-1985)	Affirmed
KNOX v. ARMTEX, INC. No. 8327SC852	Gaston (83CVS531)	Affirmed
McNAIR v. MAYNOR No. 8311SC1240	Lee (82CVS320)	Affirmed
STATE v. BAKER No. 8425SC28	Catawba (83CRS9066)	No Error
STATE v. CHASE No. 848SC41	Greene (82CRS1577)	No Error
STATE v. DOUGLAS No. 8323SC1289	Alleghany (83CRS335, 336)	Affirmed
STATE v. EDWARDS No. 833SC1326	Pitt (83CRS5981)	No Error
STATE v. JORDAN No. 8321SC1061	Forsyth (82CRS56283)	No Error
STATE v. MALLOY No. 8420SC66	Moore (82CRS5369)	No Error
STATE v. RHODES No. 844SC5	Onslow (83CRS2959) (83CRS2960) (83CRS2961) (83CRS2962)	No Error
VAUGHN v. BARTO No. 833SC1318	Craven (83CVS493)	Dismissed

APPENDIXES

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

EXTENSION OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY IN PUBLIC JUDICIAL PROCEEDINGS

AMENDMENT TO GENERAL RULES
OF PRACTICE FOR THE SUPERIOR
AND DISTRICT COURTS

Pursuant to authority of G.S. 7A-34, Rule 6 of the General Rules of Practice for the Superior and District Courts is hereby amended to add a new fourth paragraph as follows:

"The court in civil matters, on its motion or upon motion by a party, may in its discretion order that argument of any motion be accomplished by means of a telephone conference without requiring counsel to appear in court in person. Upon motion of any party, the court may order such argument to be recorded in such manner as the court shall direct. The court may direct which party shall pay the costs of the telephone calls. Conduct of counsel during such arguments may be subject to punishment as for direct criminal contempt of court."

This amendment shall be effective on and after the first day of January 1985 and shall be promulgated by the publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 28th day of August, 1984.

FRYE, J.
For the Court

IN THE GENERAL COURT OF JUSTICE
SUPREME COURT OF NORTH CAROLINA

ORDER

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, as amended 10 November 1982, is hereby extended through and including 31 December 1984.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this first day of October 1984.

FRYE, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

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UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE

WATERS AND WATERCOURSES
WILLS

VENDOR AND PURCHASER

ACCOUNTANTS**§ 1. Generally**

The trial court erred in granting summary judgment for defendant accountant in an action seeking damages for the accountant's negligent rendering of professional services in assisting plaintiff in the sale of his oil company. *Snipes v. Jackson*, 64.

APPEAL AND ERROR**§ 6.2. Finality as Bearing on Appealability**

An interlocutory order granting one defendant's motion to dismiss affected a substantial right of appellant and was immediately appealable. *Jenkins v. Wheeler*, 140.

An order which completely disposed of one of several issues in a case affected a substantial right of defendant and was appealable. *Buffington v. Buffington*, 483.

Where plaintiff alleged that defendants negligently desecrated numerous graves in a cemetery while clearing land on an adjoining farm and he alleged that he had a child buried in the cemetery, the trial court's order holding that the action was not maintainable as a class action was interlocutory but nevertheless appealable. *Perry v. Cullipher*, 761.

§ 14. Appeal and Appeal Entries

Judgment which was not for a sum certain was entered upon the filing of the written order, not on the date the trial judge announced his decision in open court, and defendant's motion to amend the findings of fact which was filed within 10 days after the written order preserved defendant's right of appeal. *Gates v. Gates*, 421.

In a civil contempt proceeding in which respondent was found to be in civil contempt for failure to submit to an administrative inspection warrant issued by the court, judgment was entered on 18 February 1983, and respondent's oral notice of appeal given at that time did not encompass the court's subsequent order, which dismissed respondent's counterclaim, entered on 18 May 1983, *nunc pro tunc* to 14 March 1983. *Brooks, Com'r of Labor v. Gooden*, 701.

§ 24. Necessity for Exceptions

By failing to except to a trial court's conclusion, plaintiff, minority shareholder, relinquished his right to pursue any other claims he might have against defendants which arose out of the management and operation of defendant corporations. *Miller v. Ruth's of North Carolina, Inc.*, 153.

§ 25. Parties Entitled to Object and Take Exception

Defendant appellee's cross-assignment of error that it was entitled to a greater recovery than it received was not an "alternative basis in law for supporting the judgment" and was not properly before the Court of Appeals. *Industrial & Textile Piping v. Industrial Rigging*, 511.

§ 42. Conclusiveness and Effect of Record

Where the trial court considered a docket sheet and court file in another case in granting summary judgment for defendants, but plaintiff appellant failed to place the docket sheet or the court file in the record on appeal, it will be presumed as a matter of law that nothing in the file aids the plaintiff or reveals any genuine issue for the jury's determination. *Stephenson v. Jones*, 116.

ASSAULT AND BATTERY

§ 3. Actions for Civil Assault

Summary judgment was improperly entered in favor of the minor defendant in an action to recover for injuries received by the minor plaintiff when he was struck by a cast worn on the arm of the minor defendant. *Anderson v. Canipe*, 534.

§ 15.2. Instructions on Assault with Deadly Weapon with Intent to Kill or Inflicting Serious Bodily Injury Generally

The trial court in a felonious assault case did not err in instructing the jury that, if the shooting of an officer happened during the commission of an armed robbery or during the flight therefrom, and defendants had acted together in the commission of the robbery, they were both legally accountable for criminal acts occurring during their joint venture. *S. v. Miller*, 392.

ASSOCIATIONS

§ 1. Definitions

Plaintiff officers were not "employees" of defendant union and thus were not entitled to exemplary damages and attorney fees under G.S. 95-25.22. *Poole v. Local 305 National P. O. Mail Handlers*, 675.

§ 5. Right to Sue and Be Sued

Pursuant to G.S. 1-69.1 union officers could sue the union. *Poole v. Local 305 National P. O. Mail Handlers*, 675.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

The sole heir of an estate had standing to sue an attorney for malpractice allegedly arising from a conflict of interest and collusion in failing to advise the administratrix to bring a wrongful death action for decedent's death, and the heir stated a claim for relief for malpractice against the attorney. *Jenkins v. Wheeler*, 140.

A trial court erred in entering summary judgment for defendant attorney in an action instituted by plaintiff seeking damages for the defendant's negligent rendering of professional services. *Snipes v. Jackson*, 64.

The evidence presented a genuine issue of material fact as to whether defendant attorney was negligent in his representation of plaintiff in a medical malpractice action. *Rorrer v. Cooke*, 305.

An attorney malpractice action for negligence in failing to present plaintiffs' wrongful death claim to the personal representative of the tortfeasor's estate within the time specified in G.S. 28A-19-3 was barred by the statute of limitations. *Thorpe v. DeMent*, 355.

§ 6. Withdrawal of Attorney from Case

Plaintiff's counsel who had entered a formal appearance was obligated to provide plaintiff with reasonable notice of his intention to withdraw, and where the record failed to show that he did so, the trial court erred in entering summary judgment against plaintiff at the time his attorney was allowed to withdraw. *Underwood v. Williams*, 171.

ATTORNEYS AT LAW — Continued**§7. Compensation and Fees Generally**

Where plaintiffs' action to recover on two credit life insurance policies was determined in their favor, the trial court did not err in declining to award plaintiffs attorney fees. *Fedoronko v. American Defender Life Ins. Co.*, 655.

AUTOMOBILES**§ 2.4. Rights and Procedures in Revocation Proceedings Related to Drunk Driving**

Petitioner's refusal to follow the directive of the breathalyzer operator to refrain from smoking constituted a willful refusal to take the breathalyzer test which justified the revocation of petitioner's driver's license. *Byrd v. Wilkins*, 516.

§ 2.8. Reinstatement of Driving Privileges

G.S. 20-28.1 excludes G.S. 20-343, which prohibits the alteration of odometers, from that class of motor vehicle laws, the violation of which justifies the non-issuance of a driver's license. *Evans v. Roberson, Sec. of Dept. of Trans.*, 644.

CEMETERIES**§ 3. Desecration of Graves**

Where plaintiff alleged that defendants negligently desecrated numerous graves in a cemetery while clearing land on an adjoining farm and he alleged that he had a child buried in the cemetery, the trial court's order holding that the action was not maintainable as a class action was interlocutory but nevertheless appealable. *Perry v. Cullipher*, 761.

In an action to recover for the desecration of graves, a "grave" includes a place containing the remains of a stillborn child. *Ibid*.

CONSPIRACY**§ 6. Sufficiency of Evidence**

The State's evidence showed only a single conspiracy to supply cocaine, and defendants could not be convicted of two separate conspiracies involving sales of cocaine on 9 June and 15 June 1982. *S. v. Rozier*, 38.

CONSTITUTIONAL LAW**§ 31. Affording the Accused the Basic Essentials for Defense**

Defendant was not entitled to a State paid investigator whom defendant wanted for the sole purpose of obtaining records which were unnecessary for him to receive a fair trial. *S. v. Poindexter*, 691.

§ 34. Double Jeopardy

Defendant was subjected to double jeopardy where the trial court at his first trial improperly determined that the jury was deadlocked and declared a mistrial. *S. v. Coviell*, 622.

§ 45. Right to Appear Pro Se

Trial court's failure to inform a *pro se* defendant of his right not to testify, if error, was harmless. *S. v. Poindexter*, 691.

CONSTITUTIONAL LAW — Continued**§ 46. Removal or Withdrawal of Appointed Counsel**

There was no merit to defendant's contention that he was compelled by the trial judge to choose between representation by appointed counsel and presenting evidence on his claim of self-defense. *S. v. Poindexter*, 691.

§ 48. Effective Assistance of Counsel

The trial court's refusal to continue defendant's trial did not deny defendant the effective assistance of counsel. *S. v. Holloway*, 521.

There was no merit to defendant's contention that the trial court should either have appointed substitute counsel or instructed appointed counsel to prepare to try the case and to call witnesses as requested by defendant. *S. v. Poindexter*, 691.

§ 67. Identity of Informants

The State was not required to disclose the identity of a confidential informant who told police about marijuana being grown in defendants' field. *S. v. Perry*, 477.

§ 68. Right to Call Witnesses and Present Evidence

The trial court did not err in failing to assist defendant in locating and subpoenaing his witnesses. *State v. Poindexter*, 691.

§ 74. Self-Incrimination Generally

A witness's silence can provide the basis for an inference by the factfinder, even though it cannot be used as evidence from which to find him guilty. *Fedoronko v. American Defender Life Ins. Co.*, 655.

CONTEMPT OF COURT**§ 6.2. Hearings on Orders to Show Cause; Sufficiency of Evidence**

The trial court did not err in finding respondent in civil contempt of court where the evidence supported the court's findings that respondent willfully refused to submit to an administrative inspection warrant issued by the court and that respondent has shown no legal cause for that refusal. *Brooks, Com'r of Labor v. Gooden*, 701.

CONTRACTS**§ 3. Definiteness and Certainty of Agreement**

A proposed contract for the sale of a home was incomplete and unenforceable because it lacked essential terms which were beyond the court's capacity to supply by implication and as to which the parties had not agreed upon a mode of settlement. *Gray v. Hager*, 331.

The trial court properly concluded that the parties entered into an informal, express equipment rigging subcontract despite the lack of the formal document contemplated by the parties. *Industrial & Textile Piping v. Industrial Rigging*, 511.

§ 4.1. Circumstances Where Consideration Was Found

Plaintiff insurance agents and agency managers could not complain that a loss ratio precondition which was incorporated into many of their contracts by way of amendment was not supported by consideration. *Fraver v. N. C. Farm Bureau Ins. Co.*, 733.

§ 12. Construction and Operation of Contracts Generally

A subcontract did not necessarily incorporate the terms and conditions of the general contract. *Industrial & Textile Piping v. Industrial Rigging*, 511.

CONTRACTS — Continued**§ 12.1. Construction of Clear and Unambiguous Agreements**

A distributorship agreement giving plaintiff the right to distribute "Pabst beer and ale" included malt liquor. *Bowles Distributing Co. v. Pabst Brewing Co.*, 341.

§ 20.1. Excuse for Nonperformance; Impossibility

In a dispute between plaintiff agents and agency managers and defendant insurance company regarding bonus renewal commissions, plaintiffs could not successfully argue that the establishment of the N. C. Reinsurance Facility caused such a change of circumstances as to justify the application of the frustration of purpose doctrine. *Fraver v. N. C. Farm Bureau Ins. Co.*, 733.

§ 20.2. Conduct by Adverse Party Preventing Performance

Plaintiff prevented defendant from fully performing its subcontract, and defendant's departure from the job was not a breach on its part, where defendant refused to sign the subcontract form because it contained terms to which defendant had not agreed, and plaintiff directed defendant either to sign the subcontract form or to terminate its work for plaintiff. *Industrial & Textile Piping v. Industrial Rigging*, 511.

§ 27.3. Sufficiency of Evidence of Damages

Plaintiff beer distributor was not entitled to recover for loss of profits for defendant's breach of the distributorship agreement but was entitled to recover damages for the diminution in value of its franchise. *Bowles Distributing Co. v. Pabst Brewing Co.*, 341.

The trial court erred in awarding punitive damages for breach of a beer distributorship agreement. *Ibid.*

§ 29. Measure of Damages Generally

In an action to recover damages for breach of warranty and breach of contract to convey real property where plaintiffs contended that defendants contracted to sell them a house with an assumable loan of 8¼% but the interest rate was in fact 9½%, the trial court applied the appropriate measure of damages, which was the present value of the difference over the term of the loan. *Starling v. Sproles*, 598.

§ 29.2. Calculation of Compensatory Damages

Damages for a general contractor's breach of a subcontract would be lost profits plus any additional expenditures contemplated in the subcontract and actually incurred. *Industrial & Textile Piping v. Industrial Rigging*, 511.

§ 29.4. Mitigation of Damages

Plaintiffs' conduct in contacting defendant numerous times in an attempt to work out a difference in their contract amounted to an adequate attempt to mitigate their damages. *Starling v. Sproles*, 598.

§ 34. Sufficiency of Evidence of Interference

The evidence of plaintiff teacher's aide was insufficient to establish malice on the part of defendant school principal so as to make out a prima facie case of malicious interference with contract where the principal lowered plaintiff's performance evaluation without consulting or informing the teacher who had co-signed the evaluation form. *Murphy v. McIntyre*, 323.

CORPORATIONS

§ 1. Incorporation and Corporate Existence

The corporate defendant could not avoid liability for its breach of a distributorship agreement by failing to sell a malt liquor product to plaintiff beer distributor on the ground that a wholly-owned subsidiary had full responsibility for all marketing decisions with respect to the malt liquor. *Bowles Distributing Co. v. Pabst Brewing Co.*, 341.

§ 6. Right of Stockholders to Maintain Action

By failing to except to a trial court's conclusion, plaintiff, minority shareholder, relinquished his right to pursue any other claims he might have against defendants which arose out of the management and operation of defendant corporations. *Miller v. Ruth's of North Carolina, Inc.*, 153.

§ 13. Liability of Officers and Agents to Third Persons for Neglect of Duties, Mismanagement, Fraud and the Like

In an action in which plaintiff sought to hold the individual defendant personally liable for money received from the sale of airline tickets but not paid to the applicable airlines, the trial court properly directed verdict for the defendant on the basis that the individual defendant signed a sales agency agreement with plaintiff "on behalf of the agency" as president-secretary and treasurer of defendant corporation. *Air Traffic Conf. of America v. Marina Travel*, 179.

Plaintiff failed to show that defendant failed to act with due diligence in her supervision of agents employed by defendant corporation. *Ibid.*

§ 14. Liability of Officers and Agents to Corporation for Neglect of Duties, Mismanagement or Wrongful Depletion of Assets

Where the trial court ordered the corporate defendants to redeem plaintiff's shares in the corporations, the court properly entered summary judgment dismissing defendants' counterclaim for damages for breaches of plaintiff's fiduciary duties while an officer and director of the corporations. *Miller v. Ruth's of North Carolina, Inc.*, 153.

COSTS

§ 4.1. Witness Fees

The trial court in a malicious prosecution action did not err in refusing to award plaintiff deposition fees and expert witness fees as part of the costs. *Williams v. Boylan-Pearce, Inc.*, 315.

COURTS

§ 3. Original Jurisdiction of Superior Court Generally

Superior Court judges had jurisdiction of a special proceeding to partition and sell real estate which had not been considered or passed on by the Clerk of Superior Court. *Wyatt v. Wyatt*, 747.

§ 4. Minimum Amount within Original Jurisdiction of Superior Court

A superior court had jurisdiction in an action in which plaintiff alleged breach of fiduciary duty, negligence, and fraud in the administration of her husband's estate and a trust created under his will. *Ingle v. Allen*, 192.

COURTS – Continued**§ 9.6. Jurisdiction to Review Rulings of Another Superior Court Judge; Final Judgments**

Sanctions imposed by one trial judge for defendants' failure to comply with a discovery order were discretionary and interlocutory, leaving a second judge the right, in his discretion, to set aside the sanctions if a change of circumstances warranted such action. *Stone v. Martin*, 650.

§ 14.1. Transfer and Removal of Causes

The superior court was not the proper division for consideration of a civil contempt proceeding and there were no grounds for transfer from the district to the superior court. *Brooks, Com'r of Labor v. Gooden*, 701.

CRIMINAL LAW**§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant**

The trial court properly admitted a witness's testimony concerning an offense committed upon her by defendant as substantive evidence of defendant's guilt. *S. v. Elliott*, 89.

§ 34.6. Admissibility of Evidence of Other Offenses to Show Knowledge

Evidence of defendants' prior distribution of illicit drugs was competent to show guilty knowledge in a prosecution for various narcotics charges. *S. v. Rozier*, 38.

§ 42.5. Admissibility of Articles Connected with Crime; Identification of Object

The trial court in a rape case did not err in admitting into evidence items found near the scene of the crime. *S. v. Welch*, 668.

§ 43. Photographs

Photographs of marijuana plants and the cornfield where they were found growing were properly admitted for illustrative purposes. *S. v. Perry*, 477.

§ 51.1. Qualification of Experts; Showing Required

The trial court did not err in admitting a sheriff's testimony about the value, weight, and stages involved in the growth and harvest of marijuana although the court made no finding as to the witness's qualifications as an expert. *S. v. Perry*, 477.

§ 60.5. Competency of Fingerprint Evidence

The trial court did not err in denying defendants' request for an instruction concerning the probative force of fingerprint evidence. *S. v. Miller*, 392.

§ 62. Lie Detector Tests

A trial court properly excluded on cross-examination questions designed to put before the jury the fact that the officer examined had refused a request to have defendant take a polygraph examination. *S. v. Williams*, 126.

§ 66. Evidence of Identity by Sight

The trial court did not err in refusing to give a requested instruction on interracial identification. *S. v. Miller*, 392.

CRIMINAL LAW — Continued**§ 66.1. Evidence of Identity by Sight; Competency of Witness; Opportunity for Observation**

There was nothing inherently incredible about a prosecuting witness's ability to make an observation and identification of defendant. *S. v. Elliott*, 89.

In a prosecution for robbery, the trial court did not err in allowing a clerk to identify defendant in open court as the person who perpetrated the robbery. *S. v. Williams*, 126.

§ 66.3. Identification of Defendant; Pretrial Lineups, Confrontations, Etc.

There was no impermissible suggestiveness in either photographic display procedures or lineup procedures used in a first-degree kidnapping and assault with a deadly weapon case. *S. v. Elliott*, 89.

§ 66.9. Suggestiveness of Photographic Identification Procedure

Although defendant succeeded in highlighting many differences between the other subjects and himself in a photographic lineup, cumulatively they did not compel a conclusion that the photographic lineup, as a whole, was impermissibly suggestive. *S. v. Williams*, 126.

Although prior photographic lineups were unduly suggestive, in-court identification testimony by three witnesses was admissible where the identifications of all three witnesses were of independent origin. *S. v. Miller*, 392.

§ 86.3. Impeachment of Defendant; Prior Convictions; Further Cross-Examination of Defendant

The prosecutor improperly cross-examined defendant as to whether he had paid another victim \$45,000 as a result of a prior assault to which defendant had pled guilty. *S. v. Potter*, 199.

§ 88.3. Cross-Examination as to Collateral Matters

Defense counsel was bound by a witness's answers denying involvement in a shoplifting incident which was wholly collateral to the issue at trial. *S. v. Perry*, 477.

§ 91.7. Continuance on Ground of Absence of Witness

The trial court's refusal to continue defendant's trial did not deny defendant the effective assistance of counsel. *S. v. Holloway*, 521.

§ 92.1. Consolidation Held Proper; Same Offense

The trial court did not err in consolidating for trial various narcotics charges against two defendants. *S. v. Rozier*, 38.

The trial court properly consolidated charges against two defendants for armed robbery and felonious assault. *S. v. Miller*, 392.

The trial court properly consolidated for trial the cases of defendants who were charged with the same offenses. *S. v. Perry*, 477.

§ 92.5. Severance

The trial court did not err in refusing to sever narcotics charges against two defendants although there were numerous charges in the case. *S. v. Rozier*, 38.

§ 98.2. Sequestration of Witnesses

The trial court did not err in denying defendants' motion to sequester three identification witnesses. *S. v. Miller*, 392.

CRIMINAL LAW — Continued**§ 99. Conduct of the Court**

A trial judge did not commit prejudicial error by informing defense counsel that he intended to issue bench warrants for perjury against both defendant and his fiancée because of apparent inconsistencies between their trial testimony and testimony at the *voir dire* on defendant's motion to suppress. *S. v. Williams*, 126.

§ 99.2. Remarks by the Court During Trial Generally

A remark by the trial judge upon sustaining an objection to defendant's attempt to introduce evidence regarding a requested polygraph exam that "you know better than that" did not reflect on the credibility of the witness or the weight of the evidence and was not prejudicial error. *S. v. Williams*, 126.

§ 102.2. Control of Jury Argument by Court

A trial court properly limited defense counsel's opening statement in a prosecution for second-degree kidnapping and assault with a deadly weapon to the nature of defendant's defense and the evidence he intended to offer to support it. *S. v. Elliott*, 89.

§ 102.6. Particular Conduct and Comments in Jury Argument

Any impropriety in the prosecutor's argument characterizing a question posed by defense counsel as "slick" was cured by the trial court's instructions. *S. v. Rozier*, 38.

The trial court did not err in overruling defendants' objection to the prosecutor's jury argument that there are those in the drug world who would play upon the natural curiosity of children. *Ibid*.

§ 102.7. Jury Argument; Comment on Character and Credibility of Witnesses

The prosecutor improperly argued to the jury that two wildlife officers could be prosecuted for perjury, fired from their jobs and lose their retirement if they testified falsely. *S. v. Potter*, 199.

The district attorney's jury argument regarding the seriousness of the offense and the credibility of defense witnesses was proper. *S. v. McCrimmon*, 689.

§ 102.8. Jury Argument; Comment on Failure to Testify

The prosecutor's jury argument that the State's evidence was uncontradicted did not constitute an improper comment upon defendant's failure to testify. *S. v. Matthews*, 526.

§ 102.9. Jury Argument; Comment on Defendant's Character and Credibility Generally

The prosecutor's jury argument that "I've heard it said that if you want to try the devil you have to go to hell to get your witnesses" did not constitute reversible error. *S. v. Rozier*, 38.

§ 102.12. Jury Argument; Comment on Sentence or Punishment

The trial court's curative instructions rendered harmless any impropriety in the prosecutor's jury argument in which he stated that there may be a higher law than the court's and read a verse from the Bible stating, "If any man defile the temple of God, him shall God destroy." *S. v. Rozier*, 38.

§ 105.1. Making and Renewal of Motion for Nonsuit

By introducing evidence, defendant waived his motion to dismiss at the close of the State's evidence. *S. v. Elliott*, 89.

CRIMINAL LAW — Continued

§ 116. Charge on Failure of Defendant to Testify

The trial court did not improperly comment on defendant's failure to testify in instructions relating to defendant's duty to show that he came under one of the exceptions to practicing medicine enumerated in G.S. 90-18. *S. v. Nelson*, 638.

§ 117. Charge on Character Evidence and Credibility of Witnesses

The trial court in a rape case did not err in denying defendant's motion to limit the number of witnesses who corroborated the prosecuting witness's testimony. *S. v. Welch*, 668.

§ 117.4. Charge on Credibility of Accomplices

The trial court in substance gave defendants' requested instruction on accomplice testimony. *S. v. Rozier*, 38.

§ 128.2. Particular Grounds for Mistrial

Defendant was subjected to double jeopardy where the trial court at his first trial improperly determined that the jury was deadlocked and declared a mistrial. *S. v. Coviell*, 622.

§ 138. Severity of Sentence and Determination Thereof

The trial court erred in failing to make separate findings as to aggravating and mitigating factors for each offense, but such error was not prejudicial where the court could have imposed sentences totaling 13 years for the offenses without finding any aggravating factors but imposed a consolidated sentence of only 10 years. *S. v. Rozier*, 38.

The trial court did not err in failing to find as a mitigating factor that one defendant was only a passive participant in various narcotics offenses. *Ibid.*

Unsworn statements by defense counsel were insufficient to require the trial court to find statutory mitigating factors. *S. v. Matthews*, 526.

§ 138.6. Severity of Sentence; Matters and Evidence Considered

In imposing sentences for voluntary manslaughter and common law robbery, the trial court erred in considering as an aggravating factor that the offenses were committed for hire or pecuniary gain. *S. v. Nelson*, 455.

§ 169.7. Exclusion of Evidence; Error Cured by Other Evidence or Instruction

The trial court erred in excluding testimony which was offered to show that an investigating officer, to whom defendant had relayed information, knew of the existence of another man resembling defendant who had been implicated in the armed robbery. *S. v. Williams*, 126.

CUSTOMS AND USAGES

§ 1. Generally

The trial court's erroneous finding that under industry customs and practices plaintiff beer distributor had the right to expect its franchise rights to be exclusive did not affect the trial court's determination that defendant brewer breached a distributorship agreement by refusing to sell a malt liquor product to plaintiff. *Bowles Distributing Co. v. Pabst Brewing Co.*, 341.

DAMAGES

§ 5. Damages for Injury to Real Property

The trial court erred in determining that the amount of damage to plaintiffs' property was the diminution in its market value, since their injury was impermanent and continuing for the purpose of measuring damages. *Casado v. Melas Corp.*, 630.

§ 11.1. Circumstances Where Punitive Damages Appropriate

In an action alleging improprieties by defendant arising from administration of an estate and trust created under a will, the evidence was sufficient to permit the jury reasonably to infer defendants' actions were motivated by malice, a reckless indifference to consequences, oppression, insult, rudeness, caprice or wilfulness, thereby properly presenting the issue of punitive damages for the jury. *Ingle v. Allen*, 192.

§ 16.3. Sufficiency of Evidence of Loss of Earnings or Profits

Plaintiff beer distributor was not entitled to recover for loss of profits for defendant's breach of the distributorship agreement but was entitled to recover damages for the diminution in value of its franchise. *Bowles Distributing Co. v. Pabst Brewing Co.*, 341.

DEAD BODIES

§ 1. Right to Possession for Burial

A testamentary provision directing disposition of decedent's body must prevail over conflicting wishes of the decedent's next-of-kin, and the next-of-kin in such a case had no standing to sue defendant hospital for negligence in its failure to carry out their instructions for cremation of decedent's body. *Dumouchelle v. Duke University*, 471.

There is no need to wait for probate in order to carry out written funeral instructions contained in the will. *Ibid.*

DEATH

§ 11. Recovery by Person Contributing to Death

Plaintiff daughter was not entitled to wrongful death proceeds arising from her brother's death in an automobile accident because the estate of her father was the sole direct beneficiary of the wrongful death proceeds arising from the son's death, and the father's estate was prevented from recovery due to the father's wrongdoing. *McDowell v. Estate of Anderson*, 725.

DEEDS

§ 20.7. Restrictive Covenants; Enforcement Proceedings

Where plaintiffs obtained a mandatory injunction ordering defendant to remove an incomplete structure which violated restrictive covenants in their subdivision, the trial court erred in requiring defendant to remove the foundation when defendant showed that he had abandoned his plan which violated the covenant and intended to use the foundation for a garage in conformity with the restrictive covenants. *Buie v. Johnston*, 463.

DIVORCE AND ALIMONY

§ 21. Enforcement of Alimony Awards Generally

An order finding defendant to be in willful contempt of court and finding defendant in arrears on his alimony payments in no way varied or conflicted with an earlier order. *Foy v. Foy*, 213.

§ 21.3. Enforcement of Alimony Awards; Evidence and Findings

The evidence before the trial court was sufficient to support a finding that defendant's failure to make alimony payments as provided by a judgment was willful. *Foy v. Foy*, 213.

§ 23.4. Jurisdiction in Child Support Case; Notice and Opportunity to Be Heard; Service of Process

The trial court in a child support case properly exercised in personam jurisdiction over defendant father who had never lived in N. C. but resided in Japan. *Miller v. Kite*, 679.

§ 23.5. Jurisdiction in Child Custody Case; Absence or Presence of Child as Factor

The trial court had jurisdiction to consider plaintiff's motion for the allowance of visitation rights filed 4½ years after entry of the custody order at a time when defendant and the minor child lived in another state. *Neal v. Neal*, 766.

§ 24. Child Support Generally

The trial court erred in ordering that defendant and her two children submit to blood grouping tests for the purpose of determining whether plaintiff was the father of the children since paternity had previously been established. *Dorton v. Dorton*, 764.

§ 24.4. Enforcement of Child Support Orders; Contempt

Defendant was in contempt for unilaterally reducing child support payments because of the remarriage of plaintiff and the majority of one of the children. *Gates v. Gates*, 421.

§ 24.8. Modification of Child Support Order; Where Changed Circumstances Are Not Shown

The trial court erred in ordering defendant to pay increased child support without making specific findings of fact regarding defendant's needs for the support of himself and the child in his custody and without finding actual past expenses of the child. *Walker v. Tucker*, 607.

§ 24.10. Termination of Child Support Obligation

A 1964 confession of judgment providing for child support until the age of 21 or until the youngest child "should become self-supporting or married" and stating defendant's desire to provide for his minor children until they became of legal age obligated defendant to pay only until the youngest child reached 18, not 21, after the age of majority was changed in 1971. *Gates v. Gates*, 421.

§ 27. Attorney's Fees Generally

The court's finding describing in general terms what services plaintiff's attorney had rendered in a child support case was insufficient to support an award of \$600 for an attorney's fee. *Gates v. Gates*, 421.

Because that part of the trial court's order increasing child support payments is vacated, the award of attorney's fees to plaintiff is also vacated. *Walker v. Tucker*, 607.

DIVORCE AND ALIMONY — Continued**§ 30. Equitable Distribution of Marital Property Generally**

The dismissal of the wife's claim for divorce because a divorce had been granted to the husband in another action did not require dismissal of her claim for equitable distribution. *Black v. Black*, 559.

A request for equitable distribution may not be granted in the face of a prior valid agreement disposing of the parties' marital property. *Buffington v. Buffington*, 483.

The trial court erred in failing to make an equitable distribution of the marital property of the parties upon defendant's proper demand therefor. *Capps v. Capps*, 755.

EASEMENTS**§ 5.3. Creation of Easement by Necessity; Sufficiency of Evidence**

The evidence established an implied easement by necessity where the dominant and servient tracts were previously held in common ownership which was ended by a transfer of part of the land, and as a result of the transfer it became necessary for defendant to have the easement claimed in order to have access to her land. *Harris v. Greco*, 739.

§ 10. Location of Easements

The trial court did not err in determining that an implied easement by necessity should follow a gravel road laid by defendant, owner of the dominant parcel. *Harris v. Greco*, 739.

ELECTRICITY**§ 2.1. Servicing Territory Annexed by Municipality**

The absolute right of a secondary supplier of electricity to serve customers within its 300-foot corridor arises upon the effective date of annexation by a municipality, statutorily defined as the "determination date." *Duke Power Co. v. City of High Point*, 378.

§ 2.3. Service to Customers; Competition between Suppliers after 1965

G.S. 160A-312 granted a city the absolute authority to extend electric service to its city-owned facilities outside the city limits. *Duke Power Co. v. City of High Point*, 335.

A proposed extension of a city's electric lines to an area to be annexed but which was then outside the corporate limits was within reasonable limitations and lawful. *Duke Power Co. v. City of High Point*, 378.

EMINENT DOMAIN**§ 6.5. Testimony of Witness as to Value**

An expert's opinion as to the highest and best use of condemned property and the value thereof using the market data or direct sales comparison method was admissible although it was based partly on hearsay information from others concerning sales of other lands. *In re Lee*, 277.

§ 6.7. Evidence of Value; Testimony as to Uses of Land

The economic feasibility of mining a sand and gravel deposit on the condemned tract and of processing the minerals was relevant and open to cross-examination and rebuttal by the condemnor. *In re Lee*, 277.

ESTOPPEL

§ 4.5. Conduct of Party Asserting Estoppel

An automobile driver who later received title to the vehicle and who was driving the vehicle pursuant to an agreement by the owner to maintain insurance on it was precluded by his own negligence from asserting that an automobile collision insurer and an insurance agent were estopped to deny collision coverage. *Thomas v. Ray*, 412.

EVIDENCE

§ 14. Communications between Physician and Patient

A trial court may override the physician-patient privilege and compel disclosure, and a patient may waive the privilege. *Green v. Maness*, 292.

§ 27. Telephone Conversations

The trial court properly admitted into evidence the testimony of plaintiff regarding a purported telephone call allegedly made by defendant. *Ingle v. Allen*, 192.

§ 32.2. Application of Parol Evidence Rule

In an action for wrongful discharge from employment, the trial court did not err in denying defendant's motion in limine seeking to prohibit the introduction of parol evidence establishing a fixed term of employment. *Hall v. Hotel L'Europe, Inc.*, 664.

§ 34.1. Admissions

A witness's silence can provide the basis for an inference by the factfinder, even though it cannot be used as evidence from which to find him guilty. *Fedoronko v. American Defender Life Ins. Co.*, 655.

EXECUTORS AND ADMINISTRATORS

§ 38. Personal Liabilities of Personal Representative

In an action alleging improprieties by defendant arising from the administration of an estate and a trust created under a will, the jury was not allowed, as defendants contended, to determine the trustees' obligations under the will. *Ingle v. Allen*, 192.

In an action for breach of fiduciary duties in the administration of an estate and trust created under a will, the evidence at trial was more than sufficient to show that the defendants at no time intended to follow the intent of the testator with regard to the purposes of the trust, and the intent not to fulfill the purposes of the trust constituted the element of harm of taking "advantage of his position of trust to the hurt of plaintiff." *Ibid*.

FRAUD

§ 5. Reliance on Misrepresentation and Deception

Defendant guarantors' reliance, if any, on alleged misrepresentations by plaintiff creditor's agent as to whether their guaranty extended to subsequent purchases was unreasonable as a matter of law. *International Harvester Credit Corp. v. Bowman*, 217.

GUARANTY

§ 1. Generally

Defendant guarantors' reliance, if any, on alleged misrepresentations by plaintiff creditor's agent as to whether their guaranty extended to subsequent purchases was unreasonable as a matter of law. *International Harvester Credit Corp. v. Bowman*, 217.

A guaranty extending to all obligations for which a corporation "is now or may hereafter become liable" was supported by consideration although plaintiff had extended credit to the corporation prior to the guaranty. *Ibid*.

Defendant guarantors waived notice of the sale of collateral for the debts which they guaranteed by language in the guaranty agreement. *Ibid*.

HOMICIDE

§ 15.5. Expert and Opinion Evidence as to Cause of Death

A doctor was properly permitted to state his opinion as to the cause of a voluntary manslaughter victim's death based on his treatment of the victim from the date of the assault upon him until his death. *S. v. Nelson*, 455.

§ 21.4. Sufficiency of Evidence of Identity of Defendant

The State's evidence was sufficient to support conviction of defendant for voluntary manslaughter resulting from an assault committed during a common law robbery. *S. v. Nelson*, 455.

§ 23.2. Instructions on Proximate Cause of Death

The trial court properly refused to give an instruction on the requirements of G.S. 130-198 that the attending physician report to the medical examiner of the county the death of any person apparently caused by a criminal act or by unusual or unnatural circumstances. *S. v. Nelson*, 455.

HUSBAND AND WIFE

§ 10.1. Void and Voidable Separation Agreements

Defendant could not avoid her separation agreement on the ground that she continued to live with plaintiff for 18 days after the agreement was signed. *Buffington v. Buffington*, 483.

INDIANS

§ 1. Generally

Any exercise of state power in a child support action after the creation of the Indian court system unduly infringed upon the tribe's asserted right of self-government. *Wildcatt v. Smith*, 1.

INJUNCTIONS

§ 2.1. Irreparable Injury

The trial court erred in enjoining a city from serving private customers by electric lines extended to city facilities outside the city limits. *Duke Power Co. v. City of High Point*, 335.

INJUNCTIONS – Continued**§ 10.1. Injunction Involving Proceedings in another State**

Where plaintiff wife filed a divorce action in this state, and the trial court had personal jurisdiction over defendant husband, the trial court had the power to restrain defendant from proceeding with a subsequent Florida divorce action. *Huff v. Huff*, 447.

§ 15. Modification of Permanent Injunctions

Where plaintiffs obtained a mandatory injunction ordering defendant to remove an incomplete structure which violated restrictive covenants in their subdivision, the trial court erred in requiring defendant to remove the foundation when defendant showed that he had abandoned his plan which violated the covenant and intended to use the foundation for a garage in conformity with the restrictive covenants. *Buie v. Johnston*, 463.

§ 16. Liabilities on Bonds

The trial court did not err in restraining defendant husband from proceeding with a Florida divorce action without requiring plaintiff wife to post security. *Huff v. Huff*, 447.

INSURANCE**§ 2.6. Commissions of Broker or Agent**

Plaintiffs were not entitled to bonus renewal commissions for 1979 pursuant to their agent/agency manager agreements with defendant insurance company since defendant was under no obligation to pay the commission when its loss ratio exceeded 63% and the company loss ratio for 1979 as reflected in its annual statement to the N. C. Insurance Department exceeded 63%. *Fraver v. N. C. Farm Bureau Ins. Co.*, 733.

§ 11. Liability for Failure to Procure Life Policy

Defendant insurance agent could not be held liable to a life insurance beneficiary when the insurer refused to pay because of false statements in the application where there was no showing that the agent knew facts which would cause the insurer to seek avoidance of the policy. *Southeastern Asphalt v. American Defender Life*, 185.

§ 18.1. Avoidance of Policy for Misrepresentations as to Health and Physical Condition

A genuine issue of material fact existed as to whether false answers to health-related questions on an application for reinstatement of a life insurance policy were placed on the application by defendant's agent without first propounding any of the questions to the insured. *Southeastern Asphalt v. American Defender Life*, 185.

§ 19.1. Waiver of Right to Declare Forfeiture for Misrepresentations; Imputation to Insurer of Knowledge of its Agent

Where the agent of defendant filled in an application for a policy of life insurance on plaintiff's son, and plaintiff, a high school graduate who could read and write, signed the application, material misrepresentations therein were imputed to plaintiff and barred his recovery under the policy. *McCrimmon v. N. C. Mutual Life Ins. Co.*, 683.

INSURANCE — Continued**§ 27.1. Credit Life Insurance**

Where plaintiffs' action to recover on two credit life insurance policies was determined in their favor, the trial court erred in awarding interest of 8% pursuant to G.S. 24-1, since the rate of interest was controlled by G.S. 58-205.3(a). *Fedoronko v. American Defender Life Ins. Co.*, 655.

§ 37.2. Insurer's Burden of Proving Exceptions from and Limitations of Liability; Suicide

In an action to recover the proceeds of insurance policies which defendant refused to pay on the ground that insured had committed suicide within one year of issuance of the policies, the trial court did not err in denying defendant's motions for directed verdict and judgment n.o.v. *Fedoronko v. American Defender Life Ins. Co.*, 655.

§ 67. Actions; Presumptions and Burden of Proof

Where defendant insurance company issued to plaintiff an insurance policy after an insurance agent completed a form entitled "Application For Workers' Compensation Insurance," drafted by the North Carolina Rate Bureau, the insurance company was estopped to assert the notice requirement of G.S. 97-2(2), applicable to sole proprietors, to deny plaintiff coverage since the insurance company was put on inquiry notice that plaintiff, as a sole proprietor, had elected sole proprietor coverage. *Doud v. K & G Janitorial Service*, 205.

§ 104. Automobile Liability Insurance; Actions against Insurer

There was no merit to plaintiff's contention that her father's automobile liability insurance carrier would be unjustly enriched if she were not allowed to recover proceeds for the wrongful death of her brother. *McDowell v. Estate of Anderson*, 725.

§ 135.1. Fire Insurance; Subrogation to Rights of Mortgagee

Where a fire insurer paid the policy proceeds to the mortgagee rather than to the mortgagor insureds, the insurer could proceed against the mortgagors either as subrogee of the mortgage or as an assignee of the mortgage, but not both, and the insurer made a binding election by counterclaiming as a subrogee in a prior action. *Payne v. Buffalo Reinsurance Co.*, 551.

§ 141. Construction of Burglary and Theft Policies

The State's evidence was sufficient to support conviction of defendant for filing a false insurance claim concerning items missing as the result of a burglary at his place of business. *S. v. Holloway*, 521.

INTEREST**§ 1. Items Drawing Interest in General**

In an action to recover for overrun on rock excavation pursuant to the parties' contract for construction of new library stacks, the trial court erred in awarding plaintiff interest. *Davidson and Jones, Inc. v. N. C. Dept. of Administration*, 563.

JUDGES**§ 2. Special Judges**

Defendant waived objection to a judgment as having been signed by a special judge out of session without his consent when he participated in negotiations concerning contents of the judgment. *Green v. Maness*, 403.

JUDGMENTS

§ 5.1. Final Judgments

The trial court's "final judgment" lacked an essential formal ingredient to be a judgment where it did not state, "Now therefore, it is ordered, adjudged and decreed that, etc." *Davidson and Jones, Inc. v. N. C. Dept. of Administration*, 563.

§ 21.1. Consent Judgments; Want of Consent

Cause is remanded for proper findings as to whether plaintiffs' attorney had the authorization of plaintiffs to institute an action against defendant and to sign a consent judgment on their behalf. *Caudle v. Ray*, 543.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

Evidence clearly showed restraint separate and independent from an alleged rape, and the trial court therefore properly denied defendant's motion to dismiss the kidnapping charge. *S. v. Welch*, 668.

LANDLORD AND TENANT

§ 13.2. Renewals

In an action on a lease agreement, the trial court erred in granting plaintiff's motion for summary judgment finding that defendant had the absolute right to only one five-year renewal with subsequent renewals only by mutual consent and in denying defendant's motion for summary judgment. *Lattimore v. Fisher's Food Shoppe*, 227.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action in General

The trial court erred in dismissing plaintiffs' claims of unfair and deceptive trade practices where the practices allegedly occurred in 1979, their claim was filed in 1983, and a four year statute of limitations applies in claims for unfair trade practices. *Jennings v. Lindsey*, 710.

§ 4.1. Accrual of Tort Causes of Action

An attorney malpractice action for negligence in failing to present plaintiffs' wrongful death claim to the personal representative of the tortfeasor's estate within the time specified in G.S. 28A-19-3 was barred by the statute of limitations. *Thorpe v. DeMent*, 355.

§ 4.2. Accrual of Negligence Actions

In an action instituted by plaintiff against his attorney, accountant and the accountant's firm seeking damages for the defendants' negligent rendering of professional services, the trial court erred in granting summary judgment on the possible basis that the statute of limitations had expired. *Snipes v. Jackson*, 64.

§ 4.3. Accrual of Cause of Action for Breach of Contract

Plaintiff's discovery of leaks in its roof in 1973, 1976 and 1977 put it on notice that the roof was entirely defective, and plaintiff's claim for the defective roof instituted in 1981 against building contractors and an engineering firm was barred by the three-year statute of limitations. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 505.

LIMITATION OF ACTIONS — Continued**§ 8.2. Sufficiency of Notice of Facts Constituting Alleged Fraud**

Trial court erred in dismissing plaintiffs' claims for fraud on the ground that they were barred by the statute of limitations where plaintiffs alleged that the fraudulent acts occurred in 1979 but were not discovered until 1981, and they alleged that defendants were their accountants and this special relationship could excuse their failure to exercise due diligence. *Jennings v. Lindsey*, 710.

§ 15. Estoppel to Plead Statute

Defendants were not equitably estopped from asserting the statute of limitations in an action to recover for a defective roof. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 505.

MALICIOUS PROSECUTION**§ 11. Proof of Existence of Probable Cause**

Plaintiff's evidence was sufficient to show an absence of probable cause in an action for malicious prosecution instituted after plaintiff employee was acquitted of misdemeanor larceny of earrings from defendant employer's store. *Williams v. Boylan-Pearce, Inc.*, 315.

§ 15. Damages

Plaintiff's evidence was sufficient for submission of an issue of punitive damages in a malicious prosecution action. *Williams v. Boylan-Pearce, Inc.*, 315.

MARRIAGE**§ 2. Creation and Validity of the Marriage**

The evidence was sufficient to support the jury's finding that plaintiff was the lawful wife of the deceased. *Howard v. Sharpe*, 555.

MASTER AND SERVANT**§ 7.5. Discrimination in Employment**

Respondent was not wrongfully dismissed from her job as a clerk-typist with an Area Mental Health Authority because of age discrimination where the evidence showed that a reduction in force was necessitated by funding cuts and that respondent was discharged because she had the lowest "relative efficiency" of the employees considered for the reduction in force. *Area Mental Health Authority v. Speed*, 247.

Where the State Personnel Commission's own findings dictated a conclusion that respondent employee was not subjected to discrimination, the Commission's authority with regard to an agency's discharge of respondent under a reduction in force was limited to issuance of an advisory opinion. *Ibid.*

§ 10. Duration and Termination of Employment

Because plaintiff neither alleged nor showed by affidavit that his employment was for a definite term, he was, as a matter of law, an employee at will who could be terminated at will. *Miller v. Ruth's of N. C., Inc.*, 672.

§ 10.2. Actions for Wrongful Discharge

In an action for wrongful discharge from employment, the trial court did not err in denying defendant's motion in limine seeking to prohibit the introduction of parol evidence establishing a fixed term of employment. *Hall v. Hotel L'Europe, Inc.*, 664.

MASTER AND SERVANT — Continued**§ 10.3. Damages in Actions for Wrongful Discharge**

An employer may not deduct social security and annuity payments received by an employee from damages owed to that employee for wrongful discharge. *Hall v. Hotel L'Europe, Inc.*, 664.

§ 49.1. Workers' Compensation; "Employees"; Status of Particular Persons

Where defendant insurance company issued to plaintiff an insurance policy after an insurance agent completed a form entitled "Application For Workers' Compensation Insurance," drafted by the North Carolina Rate Bureau, the insurance company was estopped to assert the notice requirement of G.S. 97-2(2), applicable to sole proprietors, to deny plaintiff coverage since the insurance company was put on inquiry notice that plaintiff, as a sole proprietor, had elected sole proprietor coverage. *Doud v. K & G Janitorial Service*, 205.

§ 50.1. Workers' Compensation; Who Are Independent Contractors

The Industrial Commission properly found that plaintiff was not an employee of defendant contractor, and properly concluded that plaintiff was an independent contractor at the time of his injury. *Doud v. K & G Janitorial Service*, 205.

Plaintiff logger was not an employee of defendant pulpwood company at the time of his injury by accident but was an independent contractor. *Denton v. South Mountain Pulpwood*, 366.

§ 55.1. Workers' Compensation; What Constitutes "Accident"

Plaintiff did not suffer a compensable injury by "accident" when he sustained a knee injury in shifting from a bending to a squatting position while shingling a roof. *Poe v. Acme Builders*, 147.

§ 56. Workers' Compensation; Causal Relation Between Employment and Injury

A finding by the Industrial Commission that a work-related accident did not cause plaintiff's paralysis was supported by the evidence. *Brewington v. Rigsbee Auto Parts*, 168.

§ 62.1. Workers' Compensation; Injuries on the Way to or from Work on Employer's Premises

The Industrial Commission correctly concluded that plaintiff's injury did not arise out of and in the course of her employment in that her injury arose from a risk common to the neighborhood at a time when she was performing no duties for her employer on premises which were neither owned nor maintained or controlled by her employer where plaintiff's accident occurred when she tripped over a median while walking toward defendant's store. *Glassco v. Belk-Tyler*, 237.

§ 68. Occupational Diseases

The medical evidence in a workers' compensation proceeding was sufficient for the Industrial Commission to find that plaintiff was totally and permanently disabled, and defendant's offer of continued "employment" at equal or better wages was not conclusive on this issue. *Peoples v. Cone Mills Corp.*, 263.

§ 87. Claim under Workers' Compensation Act as Precluding Common Law Action

Plaintiff's acceptance of workers' compensation benefits for the death of an employee precluded plaintiff from seeking additional compensation in a common law action based upon alleged willful and intentional acts by defendant employer. *Barino v. Radiator Specialty Co.*, 501.

MASTER AND SERVANT — Continued**§ 89.1. Workers' Compensation; Remedies Against Third Person Tortfeasors; Fellow Employee as Third Person**

The exclusive remedy provisions of the Workers' Compensation Act barred plaintiff's action for injuries inflicted by the negligence of defendant co-employee. *Pleasant v. Johnson*, 538.

§ 108. Right to Unemployment Compensation during Vacation

Applicants for unemployment benefits who were employed by the Bureau of Indian Affairs to teach in a secondary school were not entitled to benefits when they were furloughed for the two summer months because of budgetary restraints. *Fisher v. Bureau of Indian Affairs*, 758.

MUNICIPAL CORPORATIONS**§ 2. Annexation**

Statutes setting out the involuntary annexation procedure applicable to cities of 5,000 or more did not violate Art. XIV, § 3 of the N.C. Constitution because certain counties were exempted therefrom. *In re Durham Annexation Ordinance*, 77.

§ 2.3. Annexation; Compliance with Various Statutory Requirements

Annexation ordinances were not invalid because metes and bounds descriptions were not included with the ordinances when they were originally adopted. *In re Durham Annexation Ordinance*, 77.

A city's planned sewer services for an annexed area complied with statutory requirements where construction would begin within twelve months after the effective date of annexation. *Ibid*.

A city's planned police protection for newly annexed areas met statutory requirements although such plans did not include any provision for hiring additional detective or juvenile personnel. *Ibid*.

A city met requirements for providing fire protection services to newly annexed areas where a tanker service would be available until water mains and fire hydrants are installed. *Ibid*.

Petitioners failed to show that annexation ordinances were invalid on the ground that the city failed to utilize natural topographic features. *Ibid*.

§ 23.3. Extending and Furnishing Utilities and Services outside Corporate Limits

A proposed extension of a city's electric lines to an area to be annexed but which was then outside the corporate limits was within reasonable limitations and lawful. *Duke Power Co. v. City of High Point*, 378.

§ 30.19. Zoning; Changes in Continuation of Nonconforming Use

Defendant acted within its authority to enlarge a nonconforming use where it allowed a landowner to construct a larger building on a lot where its lumberyard was located and required him to raze his old building. *Lathan v. Zoning Bd. of Adjustment*, 686.

NARCOTICS**§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics**

The amount of contraband agreed upon, not the amount actually delivered, is determinative in a narcotics conspiracy case. *S. v. Rozier*, 38.

NARCOTICS — Continued**§ 2. Indictment**

Indictments charging the sale or delivery of cocaine were not fatally defective because of the use of the disjunctive. *S. v. Rozier*, 38.

An indictment charging conspiracy to traffic in cocaine was not fatally defective because it failed to specify which form of trafficking defendant conspired to commit. *Ibid.*

§ 4. Sufficiency of Evidence

The State's evidence was sufficient to support conviction of two defendants for conspiracy to traffic in cocaine. *S. v. Rozier*, 38.

The State's evidence showed only a single conspiracy to supply cocaine, and defendants could not be convicted of two separate conspiracies involving sales of cocaine on 9 June and 15 June 1982. *Ibid.*

Defendants could properly be convicted of both felonious possession of cocaine sold to an undercover agent and misdemeanor possession of small amounts of cocaine found shortly thereafter in vials for personal use. *Ibid.*

§ 4.2. Sufficiency of Evidence in Cases Involving Sale to Undercover Narcotics Agent

The State's evidence was sufficient to support a finding that both defendants knew that a sale of cocaine was being made through an accomplice to the undercover agent named in the indictment. *S. v. Rozier*, 38.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient to support convictions of two defendants for possession of cocaine with intent to sell or deliver on two separate dates. *S. v. Rozier*, 38.

The evidence was sufficient for the jury in a prosecution for possession and manufacture of marijuana where it showed that 39 marijuana plants were being grown in a cornfield farmed by defendants. *S. v. Perry*, 477.

NEGLIGENCE**§ 10. Concurring Causes**

Where plaintiffs contended that acts of defendant trucking company contributed to formation of a "delta" on their lake, full recovery by plaintiffs did not depend on their ability to apportion the damages. *Casado v. Melas Corp.*, 630.

§ 22. Sufficiency of Complaint

Plaintiffs' complaint stated a claim against defendant for damages to her property allegedly caused by defendant's negligent and unlawful operation of a rock quarry. *Ruffin v. Contractors & Materials, Inc.*, 174.

§ 29.1. Sufficiency of Evidence of Negligence

Plaintiffs' evidence presented genuine issues of material fact as to whether defendant car dealer was negligent in giving a telephone caller the serial numbers for the keys to a car purchased by plaintiff's salesman from defendant and whether such negligence was a proximate cause of plaintiff's loss by theft from the trunk of the car. *Southern Watch Supply v. Regal Chrysler-Plymouth*, 164.

NEGLIGENCE — Continued**§ 49. Negligence in Condition of Sidewalks**

A shopping center owner was not negligent in constructing and maintaining a sidewalk encircling the building which gradually increased in height from the parking lot. *Stoltz v. Burton*, 231.

PARENT AND CHILD**§ 1.6. Termination of Parental Rights; Sufficiency of Evidence**

A trial court properly found that respondent mother was present on one or more occasions when her son was beaten with a belt and did not intervene for her son's protection and did not report the same to appropriate authorities. *In re Adcock*, 222.

§ 2.3. Child Neglect

The trial court's findings dealing with respondents' failure to provide a stable living environment and proper food and clothing were clearly evidence of neglect, were relevant, and were supported by competent evidence. *In re Adcock*, 222.

A trial judge properly found and concluded that the two children involved in this appeal were neglected within the meaning of G.S. 7A-517(21). *Ibid*.

§ 8. Liability of Parent for Torts of Child

Summary judgment was properly entered for defendant parents in an action based on negligent supervision of their child who struck the minor plaintiff with a cast. *Anderson v. Canipe*, 534.

PARTITION**§ 1.2. Right to Partition**

In ordering the sale of real property and division of proceeds therefrom between the parties, the Superior Court failed to accord the prior judgment of the District Court the effect that its terms and the law required. *Wyatt v. Wyatt*, 747.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS**§ 1. Prosecutions for Practicing Without License**

The statute which prohibits the practicing of medicine without a license is not unconstitutionally vague. *S. v. Nelson*, 638.

§ 15.1. Expert Testimony

A medical expert witness's testimony that it was "quite likely" that plaintiff may have had less permanent damage if he had had earlier surgery was sufficiently specific for consideration by the jury as to the causation of plaintiff's paralysis. *Largent v. Acuff*, 439.

The trial court in a medical malpractice case erred in refusing to allow plaintiff's expert witness to give opinion testimony as to whether defendant's treatment of plaintiff complied with the appropriate standards of care. *Chapman v. Pollock*, 588.

§ 15.2. Who May Testify as Experts

A witness was qualified to give opinion testimony as to the approved practices of nurse's aides in helping convalescing patients to take showers. *Biggs v. Cumberland County Hospital System*, 547.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS — Continued**§ 17. Sufficiency of Evidence of Departing from Approved Methods or Standard of Care**

The trial court in a medical malpractice case erred in directing verdict against plaintiff where the evidence tended to show that defendant's treatment of plaintiff for appendicitis did not meet the standard of care recognized and followed by doctors in the community. *Chapman v. Pollock*, 588.

§ 20.2. Instructions

It is permissible to submit separate issues on negligence and causation provided the jury is adequately instructed on the issues submitted. *Green v. Maness*, 292.

The trial court in a medical malpractice case erred in misstating defendant's contention with respect to his diagnosis and treatment of plaintiff. *Largent v. Acuff*, 439.

§ 21. Damages in Malpractice Actions

Defendant hospital was not entitled to a new trial in a medical malpractice action because plaintiff's counsel, pursuant to a request from defense counsel, stated that the monetary relief sought was \$75,000 and thereafter argued to the jury that plaintiff had been damaged in excess of \$176,000. *Biggs v. Cumberland County Hospital System*, 547.

Plaintiff proved the amount of damages with sufficient certainty to support an award in a medical malpractice action. *Largent v. Acuff*, 439.

PLEADINGS**§ 17. Nature and Purpose of Reply**

The function of a reply is to deny new matter alleged in the answer or affirmative defenses which the plaintiff does not admit, and the reply may not state a cause of action. *Miller v. Ruth's of North Carolina, Inc.*, 153.

PRINCIPAL AND AGENT**§ 4. Proof of Agency Generally**

Defendant university did not hold a faculty member out as its agent in organizing a trip to China, and plaintiff could not hold defendant liable when the venture failed and plaintiff lost a considerable sum of money. *Sipfle v. Bd. of Governors of UNC*, 752.

PROCESS**§ 9.1. Personal Service on Nonresident Individuals in another State; Minimum Contacts Test**

Defendant nonresident had sufficient minimum contacts with this state and exercise of personal jurisdiction over him did not violate his right to due process where the parties had an ongoing vendor-vendee relationship authorized by their franchise agreement, defendant made purchases from plaintiff on several occasions and agreed to make payments on its promissory note at plaintiff's N. C. offices, and plaintiff's performance under the agreement occurred largely in this state. *Harrelson Rubber Co. v. Layne*, 577.

PUBLIC OFFICERS**§ 12. Removal from Office**

Where the State Personnel Commission's own findings dictated a conclusion that respondent employee was not subjected to discrimination, the Commission's authority with regard to an agency's discharge of respondent under a reduction in force was limited to issuance of an advisory opinion. *Area Mental Health Authority v. Speed*, 247.

QUASI CONTRACTS AND RESTITUTION**§ 2. Actions to Recover on Implied Contracts Generally**

A quantum meruit recovery would be proper for the value of extra work performed by a subcontractor which was not specified in the subcontract. *Industrial & Textile Piping v. Industrial Rigging*, 511.

RAPE**§ 3. Indictment**

G.S. 15-144.1(a) does not require that the indictment include an averment "with force and arms." *S. v. Welch*, 668.

REGISTRATION**§ 1. Necessity for Registration and Instruments within Purview of Registration Statutes**

The Connor Act does not favor persons withholding from the public record deeds or contracts to convey or reconvey lands, particularly when third parties have given valuable consideration for the lands. *Stephenson v. Jones*, 116.

§ 5.1. Protection of Purchasers for Valuable Consideration

Vendees' purchase of land from an attorney and his wife was without notice of any facts which would affect legal title. *Stephenson v. Jones*, 116.

Vendees who bought a farm from an attorney and his wife were the lawful owners thereof free and clear of any claims of plaintiff purported owner who claimed a better right to the farm pursuant to an alleged unrecorded oral promise by the attorney and his wife to reconvey the farm to him once a lawsuit with his wife was settled. *Ibid*.

ROBBERY**§ 4.2. Sufficiency of Evidence in Common Law Robbery Cases**

The State's evidence was sufficient to support conviction of defendant for common law robbery. *S. v. Nelson*, 455.

§ 4.5. Cases Involving Aiders and Abettors in which Evidence Was Sufficient

The evidence was sufficient for the jury in a prosecution for armed robbery where it tended to show that defendant waited in the getaway car while his two companions robbed a convenience store. *S. v. Hockett*, 495.

§ 5.6. Instructions Relating to Aiding and Abetting

The trial court's instructions fully expressed the recognized legal principle that presence alone is not sufficient to support a conviction for aiding and abetting. *S. v. Hockett*, 495.

RULES OF CIVIL PROCEDURE**§ 4. Process**

That an original summons was not endorsed within 90 days of its issuance and no alias or pluries summons was issued within that time did not invalidate the service that was subsequently accomplished. *Blackwell v. Massey*, 240.

Plaintiff did not establish valid service of process over defendant where the affidavit of plaintiff's attorney and a "Delivery Notice Receipt" received by plaintiff's attorney showed only that the summons was forwarded to defendant's place of business. *Hunter v. Hunter*, 659.

§ 13. Counterclaim

In a civil contempt proceeding in which respondent was found to be in civil contempt for failure to submit to an administrative inspection warrant issued by the court, judgment was entered on 18 February 1983, and respondent's oral notice of appeal given at that time did not encompass the court's subsequent order, which dismissed respondent's counterclaim, entered on 18 May 1983, *nunc pro tunc* to 14 March 1983. *Brooks, Com'r of Labor v. Gooden*, 701.

§ 23. Class Actions

Where plaintiff alleged that defendants negligently desecrated numerous graves in a cemetery while clearing land on an adjoining farm and he alleged that he had a child buried in the cemetery, the trial court did not abuse its discretion in denying certification of the case as a class action. *Perry v. Cullipher*, 761.

§ 26. Depositions in a Pending Action

A doctor who had served as a consulting physician in the treatment of the minor plaintiff was "an actor or viewer with respect to the transactions or occurrences" upon which plaintiffs based their action and could be deposed as an ordinary witness without a court order although defendant had designated the doctor as an expert witness for the defense. *Green v. Maness*, 403.

The trial court acted within its discretion in allowing further discovery by oral deposition of defendant's expert witnesses. *Ibid.*

§ 37. Failure to Make Discovery; Consequences

The taxing of court costs, attorney fees and other reasonable expenses against defendant was proper under Rule 26(c) because defendant's motion to quash a notice of deposition and his motion for a protective order were denied and under Rule 37(a)(4) because plaintiffs' motion to compel discovery was allowed. *Green v. Maness*, 403.

Sanctions imposed by one trial judge for defendants' failure to comply with a discovery order were discretionary and interlocutory, leaving a second judge the right, in his discretion, to set aside the sanctions if a change of circumstances warranted such action. *Stone v. Martin*, 650.

§ 56.2. Summary Judgment; Burden of Proof

Where plaintiff established by affidavits that she owned the land involved and that the purported deed from her that defendant relied upon was neither signed nor authorized by her, and thus was without legal force and effect, and where defendant submitted no evidence contrary thereto, the trial court properly entered summary judgment for plaintiff. *Blackwell v. Massey*, 240.

§ 58. Entry of Judgment

The trial court's order requiring defendant to resume child support payments until the child reached 21, married, died or became self-supporting was not for a

RULES OF CIVIL PROCEDURE — Continued

sum certain, and entry of judgment depended on the direction of the trial judge pursuant to Rule 58. *Gates v. Gates*, 421.

§ 60.2. Grounds for Relief from Judgment or Order

The trial court did not err in awarding plaintiff a new trial on the ground of newly discovered evidence in an action for the wrongful appropriation and use of trade secrets. *Conrad Industries v. Sonderegger*, 159.

§ 65. Injunctions

The trial court did not err in restraining defendant husband from proceeding with a Florida divorce action without requiring plaintiff wife to post security. *Huff v. Huff*, 447.

SALES**§ 17. Actions for Breach of Warranty; Sufficiency of Evidence**

Plaintiffs were contributorily negligent as a matter of law in using a defective vehicle for three years and driving it 62,000 miles in spite of the fact that they were aware of noxious fumes in the passenger area within a week after it was purchased. *Gillespie v. American Motors Corp.*, 531.

SCHOOLS**§ 13.2. Dismissal of Teachers**

Plaintiff's claim against a school principal based on an evaluation of her that influenced the county school board not to rehire her as a teacher's aide must be dismissed where plaintiff failed to exhaust her administrative remedies provided by G.S. 115-34. *Murphy v. McIntyre*, 323.

The evidence of plaintiff teacher's aide was insufficient to establish malice on the part of defendant school principal so as to make out a prima facie case of malicious interference with contract where the principal lowered plaintiff's performance evaluation without consulting or informing the teacher who had co-signed the evaluation form. *Ibid.*

There was no substantial evidence which would support a finding that plaintiff was physically incapacitated at the time of her dismissal as a classroom teacher and no substantial evidence to support the conclusion that she was properly dismissed. *Bennett v. Bd. of Education*, 615.

SEARCHES AND SEIZURES**§ 3. Searches at Particular Places**

Marijuana plants were properly seized from cornfields farmed by defendants where the plants were not near a dwelling or in an area in which defendants showed that they had a legitimate expectation of privacy. *S. v. Perry*, 477.

§ 47. Voir Dire Hearing; Admissibility and Competency of Evidence

The trial court properly denied defendant's motion to suppress the testimony identifying defendant's MGB as the vehicle the victim's assailant drove away in on the ground this evidence was obtained as the result of the seizure of his vehicle pursuant to an invalid search warrant. *S. v. Elliott*, 89.

STATE

§ 4. Actions against the State; Sovereign Immunity

The State's waiver of sovereign immunity in a breach of contract action is valid only to the extent expressly stated in G.S. 143-135.3, and the statute expressly limits a contractor to a claim for such amount as he deems himself entitled to under the terms of the contract. *Davidson and Jones, Inc. v. N. C. Dept. of Administration*, 563.

Under the terms of the parties' contract for construction of new library stacks, plaintiff could recover neither general conditions costs nor home office overhead costs incurred because of unanticipated substantial rock excavation. *Ibid.*

Where the trial court found that late payment by defendant for rock excavation resulted in plaintiffs incurring a certain amount in financing costs, the trial court erred in awarding that amount to plaintiffs. *Ibid.* In an action to recover for overrun on rock excavation pursuant to the parties' contract for construction of new library stacks, the trial court erred in awarding plaintiff interest. *Ibid.*

TAXATION

§ 22.1. Exemption from Taxation; Property of Charitable and Educational Institutions; Particular Properties and Uses

Personal property owned by a scientific association which was being used by a contractor hired by the association to conduct research projects was exempt from ad valorem taxes as being exclusively used by its owner for non-profit scientific purposes. *In re Appeal of Mecklenburg County*, 133.

§ 45. Title and Rights of Purchaser at Tax Sale

Only a vacant lot was conveyed by the sheriff's deed in a tax foreclosure proceeding although the notice of sale referred to a tax map which contained a description of the vacant lot and an adjoining lot containing a house. *Harden v. Marshall*, 489.

Defendant taxpayer was not estopped to assert ownership of a house and lot purportedly sold in a tax foreclosure proceeding although she may have thought the house and lot had been conveyed in the proceeding. *Ibid.*

TRIAL

§ 3.2. Motions for Continuance; Particular Grounds

The trial judge erred in denying plaintiffs' motion for a continuance in a medical malpractice action. *Green v. Maness*, 292.

§ 10.3. Court's Expression of Opinion; Remarks Respecting Expert Witness

The trial court did not express an opinion by ruling in the presence of the jury that a witness was an expert in the testing of sand and gravel deposits where the witness was not a party to the litigation. *In re Lee*, 277.

§ 49. New Trial for Newly Discovered Evidence

The trial court did not err in awarding plaintiff a new trial on the ground of newly discovered evidence in an action for the wrongful appropriation and use of trade secrets. *Conrad Industries v. Sonderegger*, 159.

TROVER AND CONVERSION

§ 2. Nature and Essentials of Action for Possession of Personality

In a civil action where plaintiff sought to recover money which defendant allegedly wrongfully converted to her own use, the trial court erred in granting summary judgment for defendant. *Gadson v. Toney*, 244.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The trial court properly dismissed plaintiffs' claim that in selling its roofing materials to plaintiffs, defendant engaged in an unfair and deceptive trade practice. *Warren v. Guttanit, Inc.*, 103.

UNIFORM COMMERCIAL CODE

§ 14. Implied Warranties; Fitness for Particular Purpose

A trial court properly found and concluded that defendant expressly and impliedly warranted the fitness of its roofing materials and breached the warranties so made. *Warren v. Guttanit, Inc.*, 103.

§ 24. Right to Revoke Acceptance of Goods; Particular Cases

A trial court properly found that plaintiffs revoked the acceptance of roofing material. *Warren v. Guttanit, Inc.*, 103.

§ 26. Breach of Warranty; Damages

The trial court erred in limiting plaintiffs' damages in an action alleging breach of express and implied warranties for roofing materials to the provisions of G.S. 25-2-711 and G.S. 25-2-713. *Warren v. Guttanit, Inc.*, 103.

VENDOR AND PURCHASER

§ 2. Time of Performance

The trial court erred in failing to make findings or conclusions concerning whether a reasonable time for performance of a contract for the sale of land had elapsed between the agreed closing date and the time the vendor attempted to terminate the contract. *Fletcher v. Jones*, 431.

§ 2.3. Waiver of Time of Performance; Extension of Time

An exchange of written, mutual promises to extend the closing date of a contract for the sale of land was binding upon the parties without further consideration, but the vendor's oral statements indicating his continuing willingness to convey the land as soon as his divorce became final were insufficient to constitute a valid second modification of the closing date. *Fletcher v. Jones*, 431.

§ 5. Specific Performance

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